[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 256 and 270.

THE KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error.

vs.

THE ARGONAUT MINING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

The record in this cause was filed by defendant in error, and a motion was made therein to dismiss the writ of error or affirm the judgment. The number assigned to this on the present calendar is 256.

By direction of this Court further hearing of this motion was postponed until the case should be reached on its merits. Subsequently a second record was filed by plaintiff in error.

There is but one printed record, however, and that is the one numbered 256, the second printing of the record having been considered to be unnecessary. As we understand the rules and practice of this Court the motion to dismiss or affirm and the cause on its merits are to be presented when No. 256 is reached upon the calendar of this Court, that being the only proceeding in which the record is printed.

As to the motion to dismiss or affirm we respectfully invite the Court's attention to the brief in support of it presented in behalf of defendant in error and now on file. Without waiving this motion, but respectfully insisting thereon, the present brief will be limited to a discussion of the merits of the case as presented upon the writ of error.

ASSIGNMENTS OF ERROR.

The record contains twenty-six assignments of error.

Assignments I to XX are all of the same character and purport to be founded upon errors committed by the trial court in the admission or consideration by the court of certain facts which appeared in the agreed statement of facts upon which the case was tried, which action by the court below it is claimed was approved by the State Supreme Court. These assignments are all in the same form, *e. g.*:

> " At said trial the defendant specifically set forth, " made and claimed its objection to the admission or " consideration by the Court as evidence or as possessing " probative force herein of."
>
> [Then follows statement of the fact appearing in the agreed statement.]
>
> " The ruling of the Supreme Court upon said objection " and the affirmance of such ruling by the Supreme " Court are designated as an assignment of error upon " which plaintiff in error will rely for a reversal of the " decision and judgment herein."

We think that these assignments are readily eliminated from consideration.

The reception by the trial court of immaterial and irrelevant evidence in no sense involves a federal question of which this Court will take cognizance.

With reference to assignments of this character the rule has been announced by the Court as follows:

> "This Court has no jurisdiction to consider and revise "the decision of a state court, however erroneous it may "be in admitting the evidence to establish the fact. But "when evidence is admitted as competent for this pur- "pose, and it is sought to give it effect for other purposes "which do involve questions giving the Court juris- "diction, then the decisions of state courts on the effect "of such evidence may be fully considered here, and "their judgments reversed or affirmed, in a similar man- "ner as if a like question had arisen in a Supreme Court "of error of a State, when reversing the proceedings of "inferior courts of original jurisdiction."
>
> *Dower* v. *Richards*, 151 U. S. 658, 667;
> Quoting from *Mackay* v. *Dillon*, 4 How. 421, 447.

The Supreme Court of California not only declined to give effect to the evidence considered by the trial court over the Kennedy Company's objections, but held substantially that the facts objected to were not material and no substantial error was committed by the trial court in overruling the objections. The Court in its opinion makes use of the following language in this behalf, speaking through Justice Temple:

> "The cause was submitted in the trial Court upon an "agreed statement of facts, each party having the right to "to object to the relevancy, competency and materiality of "any part of it. Certain objections to evidence were made "by the appellant, which were overruled by the Court, "and the main argument here has been in regard to these "rulings. Much of the evidence was objected to simply "upon the ground of immateriality. All that I deem it "necessary to say in regard to such rulings is that, ad- "mitting that the trial court erred, as I am inclined to

" think it did, defendant has suffered no harm. The " question of law upon which the case must turn is not " changed or affected by receiving this immaterial evi- " dence."

Record, p. 74.

In the light of this statement of the Supreme Court of California, defining its attitude on the subject of the objections to the evidence and rulings made by the trial court thereon, we are at a loss to understand how plaintiff in error can assert a reliance upon an error which the Supreme Court of California did not commit.

If there had been involved before the State Supreme Court a "federal question" in its true sense it is quite manifest that the Court in its determination did not seek to give effect to any of the immaterial evidence. Therefore there is no assignable error as to the admission of such evidence.

Evidently counsel for plaintiff in error, after reprinting in full the twenty assignments, reached this conclusion, as their brief does not discuss a single one of them.

The "Appendix" to the brief, consisting of the argument of one of the counsel addressed to the trial court, does not, as to these assignments at least, challenge our attention as a discussion of errors committed by the Supreme Court of California which are the subject of the present investigation.

The remaining assignments of error attack the conclusions of law and the judgment of the trial court and its affirmance by the Supreme Court of California. They do not, in our judgment, demand detailed consideration. They simply involve the inquiry, Is the judgment which was affirmed by the Supreme Court of California erroneous?

STATEMENT OF THE CASE.

There is but little room for controversy as to the essential facts upon which the judgment in this cause ultimately and

necessarily rests. These facts are all embodied in an agreed statement forming part of the judgment roll. We are not content with the statement of the facts contained in the brief of plaintiff in error. We express our preference for our own method of presenting and correlating them as a basis for discussing the law.

For convenience we herewith reproduce as Figure 1 the map "Exhibit A," forming a part of the agreed statement of facts, appearing opposite page 34 of the printed record:

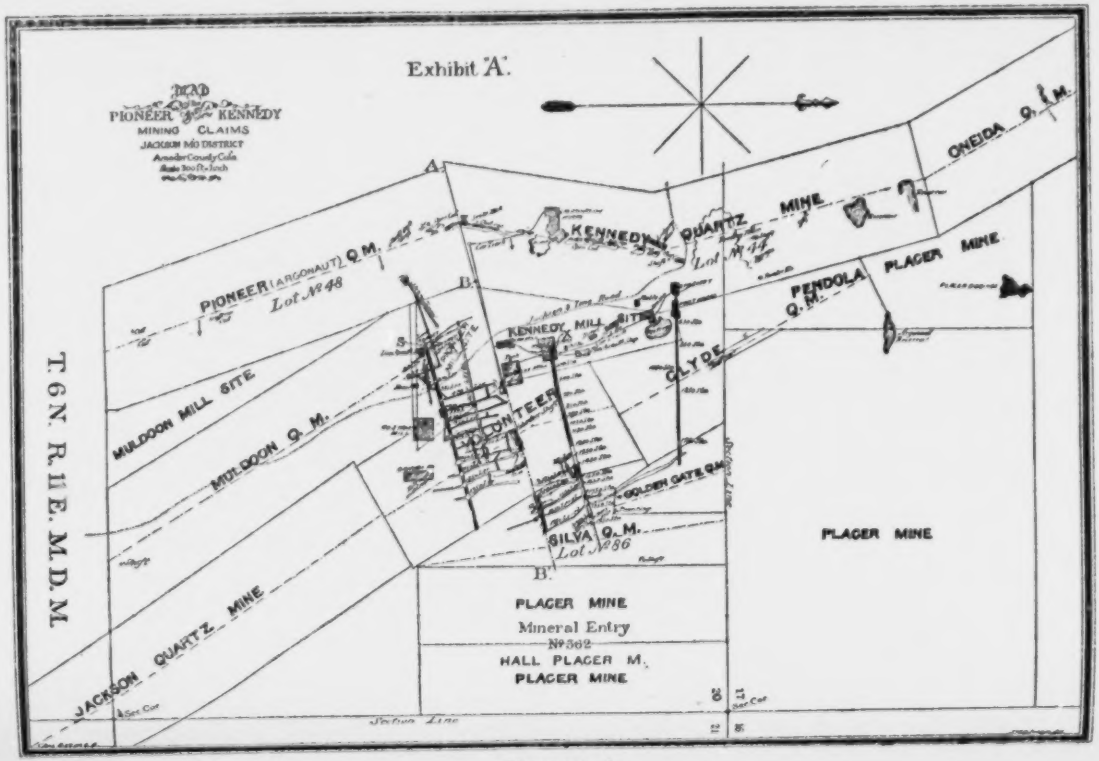
Exhibit A.
PIONEER KENNEDY
MINING CLAIMS
JACKSON MD DISTRICT
PIONEER (ARGONAUT) Q. M.
Lot №48
KENNEDY QUARTZ MINE
Lot №47
ONEIDA Q. M.
PENDOLA Q. M.
PLACER MINE
KENNEDY MILL SITE
CLYDE
VOLUNTEER
GOLDEN GATE Q.M.
MULDOON MILL SITE
MULDOON Q. M.
SILVA Q. M.
Lot №56
JACKSON QUARTZ MINE
PLACER MINE
Mineral Entry
№562
HALL PLACER M.
PLACER MINE
PLACER MINE
Section Line
T. 6 N. R. 11 E. M. D. M.
A
B
B'

6

The Facts.

The parties to this action are coterminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer or Argonaut mine, belonging to Defendant in error, into the Kennedy mine, belonging to Plaintiff in error. The common boundary is the line A—B on "Exhibit A," crossing the lode at the point Z. The line A—B—B^1 is this end line produced indefinitely in the direction of the dip or downward course of the vein.

Both the Pioneer and Kennedy are patented. They were surveyed for patent by the same deputy mineral surveyor in 1871, and patents were applied for the same year. The Kennedy was finally entered and paid for in November, 1871, and patent issued July 29, 1872. The Pioneer was finally entered and paid for and certificate of purchase from the government issued February 23, 1872. Patent was issued in August following. During the pendency of the patent proceedings a conflict arose as to a segment of ground lying at the north end of the Pioneer and at the south end of the Kennedy. The Kennedy patent application was suspended awaiting the determination of the controversy.

PAR. VII., AGREED STATEMENT. Record, p. 14.

Subsequently an agreement was entered into between the then owners of the two properties, who were predecessors in title of the present litigants, by which the controversy was adjusted.

PAR. VIII., AGREED STATEMENT. Record, p. 15.

It is but fair to state that the trial court declined to consider this agreement as a factor in the case, and sustained the objection of plaintiff in error thereto. But it is in the case as a

fact. Whether any plausible argument may be legally deduced from it or not is a question we will not discuss at this juncture.

The essential fact, however, is that the end line A—B crosses the lode, and as between the Pioneer and Kennedy mines is a common end line.

Both parties have sunk working shafts, the mouths or openings of which do not start at the outcrop or apex, but in front or to the east of it, each intersecting the vein, however, in depth, and all the workings of both parties to this litigation, so far as the ore bodies in controversy are concerned, are on this vein.

PAR. XXIV., AGREED STATEMENT. Record, p. 30.

This vein on its dip or downward course passes underneath the Silva quartz mine, belonging to plaintiff in error, located and patented on another vein, which has its top or apex within said Silva ground.

This Silva quartz mine was patented to plaintiff in error February 6, 1893, which patent recites an entry made in October, 1892. This patent contains the following reservation:

> "FIRST: That the premises hereby granted, with the "exception of the surface, may be entered by the pro- "prietor of any other vein, lode, or ledge, the top or "apex of which lies outside of the boundary of said "granted premises, should the same in its dip be found "to penetrate, intersect, or extend into said premises, for "the purpose of extracting and removing the ore from "such other vein, lode, or ledge."
>
> Trans., fol. 191.

The ore extracted by plaintiff in error which is the subject of controversy, although taken from the Pioneer-Kennedy vein, was south of and beyond the Kennedy south-end boundary, and no right has been or can be predicated upon the

ownership by appellant of the Kennedy Mine. In this aspect, of the case the ownership by plaintiff in error of the Kennedy Mine is of no controlling legal force. Yet this fact of ownership, the conduct of plaintiff in error in extracting the ore, the manner of its extraction, its attitude as a coterminous mining proprietor, the relative situation of the properties and conduct of the two companies and their respective predecessors in title, are parts of the *res gestæ*, and essential to a proper understanding of the case in all its lights and shadows.

The ultimate problems involved are few and simple.

The task of this Court is limited to the application of but few principles of law to a case where all the facts are conceded.

The case presented upon the pleadings and agreed statement of facts is, therefore, one where the proprietor of a patented mining claim, having within its boundaries the apex of a vein, insists upon its ownership of that vein throughout its entire depth, within vertical planes drawn through its end lines, and those lines produced indefinitely in the direction of the dip, as against its neighbor who owns a part of the apex of the same vein, the end line between them being a common one, but who has crossed beyond and out of the common end-line boundary and taken the ore, reduced it and applied the proceeds to its own use, asserting a right to do so by virtue of its ownership of another mining claim, held by a junior title, underneath the surface of which the vein penetrates. The legal aspects of the case may be briefly summarized:—

CONTENTION OF PLAINTIFF IN ERROR.

Plaintiff in error contends:—

(1) That *prima facie* as the owner of the Silva Quartz Mine, overlying the dip of the vein in controversy, and the ore bodies in dispute, it owns everything underneath the surface of that claim found anywhere within vertical planes drawn through the surface boundaries. That to overcome this *prima facie* presumption it devolves upon the defendant in error to show that by some grant to it from the Government the title to the underlying Pioneer vein has been segregated from the title to the overlying Silva surface.

(2) That the Pioneer Mine was purchased from the Government, entered and paid for prior to the passage of the Act of 1872—*i. e.*, under the Act of 1866; that this Act, inferentially at least, required end-lines to be parallel, as a condition precedent to the exercise of the extralateral right. The end-lines of the Pioneer are not parallel; therefore there is no extralateral right. As a corollary to this, the ore-bodies in dispute belong to the plaintiff in error as the proprietor of the overlying surface of the Silva, upon the common law presumption that he who owns the surface owns everything underneath it.

(3) That conceding for the purpose of argument that the Act of 1866 did not require end-lines to be parallel, the Act of 1872 made such parallelism an essential. This Act in this respect was retroactive, and the Pioneer owners were compelled to either surrender to the Government their complete equitable title, evidenced by their certificate of purchase, go into the field and reform their lines, or abandon all claim to any extralateral right.

Corollary same as above.

In both trial and appellate courts, plaintiff in error urged the following:—

(4) That if this lack of parallelism does not prevent the exercise of *all* extralateral right, as the Pioneer end-lines diverge, it is the duty of the Court to whet its judicial carving-knife and carve out a segment of the vein, which will rectify the divergence, practically making new end-lines; and so carve it that the ore bodies in dispute may fall *without* the judicially constructed north end-line and *within* the "common-law" incidents of ownership of the Silva Quartz Mine belonging to the Kennedy Company.

Corollary: Same as above.

In the brief of plaintiff in error we find no discussion of this last contention. Evidently it has been abandoned. Counsel certainly cannot expect us to search through the "Appendix" to their brief for an excuse to here controvert what they were pleased to say to the trial court on this subject.

CONTENTION OF DEFENDANT IN ERROR.

While protesting that no fair interpretation of the mining laws or the theories upon which they are framed would convey to a mining locator or patentee the *title* to any part of any vein which did not have some portion of its top or apex within the surface boundaries, we may concede that, as a matter of *presumption*, the owner of a mining claim, *prima facie*, owns everything underneath its surface, *usque ad orcum*, and that the burden is upon the outside apex proprietor, to show his right to penetrate underneath the surface of another claim overlying the dip of the vein. There have been thoughtful and well-considered opinions to the contrary,

Jones v. *Prospect Mt. Tunnel Co.*, 21 Nev. 339, 348;
Montana Co. Ltd. v. *Clark*, 42 Fed. 626, 630,

but we admit that the weight of authority casts the burden upon the outside apex proprietor.

Cheesemen v. *Hart*, 42 Fed. 98, 105;
Iron S. M. Co. v. *Campbell*, 17 Colo. 267;
Duggan v. *Davey*, 4 Dak. 110;
Bell v. *Skillicorn*, 6 New Mex. 399;
Leadville M. Co. v. *Fitzgerald*, 4 Morr. M. Rep. 380;
Doe v. *Waterloo M. Co.*, 54 Fed. 935, 937;
Cons. Wyoming v. *Champion M. Co.*, 63 Fed. 540, 550;
Carson City G. & S. M. Co. v. *North Star M. Co.*, 83 Fed. 658, 663.

We maintain, however, that this presumption is one flowing from the common law, and such rights as are predicated on it are not referable to the laws of Congress, and that a denial by a state court of an asserted common-law right is not subject to review in this Court. We have advanced this view in our briefs filed in support of our motion to dismiss or affirm.

Without waiving this contention we may concede that the burden was upon defendant in error to establish his rights to the ore bodies in dispute underneath the Silva surface—that is, it was called upon to overcome the *prima facie* presumption flowing from the surface ownership. With this preliminary statement, the contention of defendant in error as presented to the courts below may be outlined.

I.

The title of the Argonaut Company to the Pioneer or Argonaut mine originated, ripened, and became vested in its predecessors under the Act of July 26, 1866. This Act did not, either in terms or inferentially, require end-lines to be

parallel, and no consequence is attached to a deviation from parallelism. This rule has been announced repeatedly by this Supreme Court of the United States; it is no longer an open question.

II.

Although the end lines were not required to be parallel under the Act of 1866, yet if by any process of reasoning any limitation upon the extralateral right were imposed upon the locator's title, by reason of the divergence of the end lines, such limitation was removed by the Act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end line planes of such location as it then existed.

III.

The title evidenced by the certificate of purchase, issued prior to the passage of the Act of 1872, was the complete equitable title, equivalent for all practical purposes to the issuance of a patent. Congress could not deprive the purchaser of any rights acquired under that certificate, nor cast upon such purchaser any additional burdens. It is quite manifest, however, that Congress never intended that the estate of any mining locator, held prior to May 10, 1872, should suffer any diminution or curtailment by reason of the Act passed on that day.

IV.

The patent of the United States issued to the predecessor in title of the Argonaut Company in terms grants the vein throughout its entire depth, between the end lines described in the patent, and these lines extended in their own direction. The Land Department had jurisdiction of the subject-matter. If more was given than the patentee should have had, it is a question between the government and the patentee; outsiders cannot collaterally assail the patent.

V.

The courts cannot construct end lines. The end lines described in a patent issued by the executive cannot be readjusted by the judiciary. The extralateral rights of the Pioneer must be determined by the calls of the patent in connection with the law under which the right to it became perfected, and the physical facts as to the course of the vein through the ground.

VI.

If this be not true, the only method for adjusting inequalities for which any judicial precedent can be found, is announced in the Eureka case—*i. e.*, lines drawn at right angles to the course of the vein—at the extreme points on the vein within the location. The application of this theory will give all the ore bodies in dispute (and more) to the Argonaut Company.

VII.

The Kennedy Mining and Milling Company, by reason of its acts and conduct, and that of its predecessors in title, are estopped from asserting that the Argonaut Mining Company has no extralateral right in the vein in dispute.

These are substantially the contentions presented to the trial and appellate courts, and are those which will be urged here.

The Decisions of the Courts Below.

The opinion of the trial court is not a part of the record here. We print it as an appendix to this brief. It contains a clear statement of the case and a logical analysis and application of the law to the facts. An inspection of this opinion indicates that the conclusions of law and judgment were based upon the following principles:

(1) The owners of the Pioneer having entered and paid for their claim and received from the Government a certificate of purchase prior to the passage of the Act of 1872, the extralateral rights pertaining to the claim must be determined under the Act of July 26, 1866. The Act of 1872 was confirmatory of these rights.

(2) Under the Act of 1866 end-lines were not required to be parallel, and the non-parallelism of such lines of the Pioneer did not deprive the owners of that claim of any extralateral right.

(3) Under the doctrine of the Eureka case (4 Sawy. 302) as affirmed by the Supreme Court of the United States (103 U. S., 839) the ore bodies in dispute are within the extralateral rights of the Pioneer and belong to the Argonaut Company. They do not pertain to the Silva mine of the Kennedy Company.

In deciding the appeal from the judgment of the trial court, the Supreme Court of California practically eliminated all the factors in the case, save the respective patents and the stipulated facts as to the position of the vein and the *situs* of the ore bodies in dispute.

The Court's opinion is explained by reference to a diagram appearing opposite page 74 in the record, and which for convenient reference we herewith reproduce as figure 2:

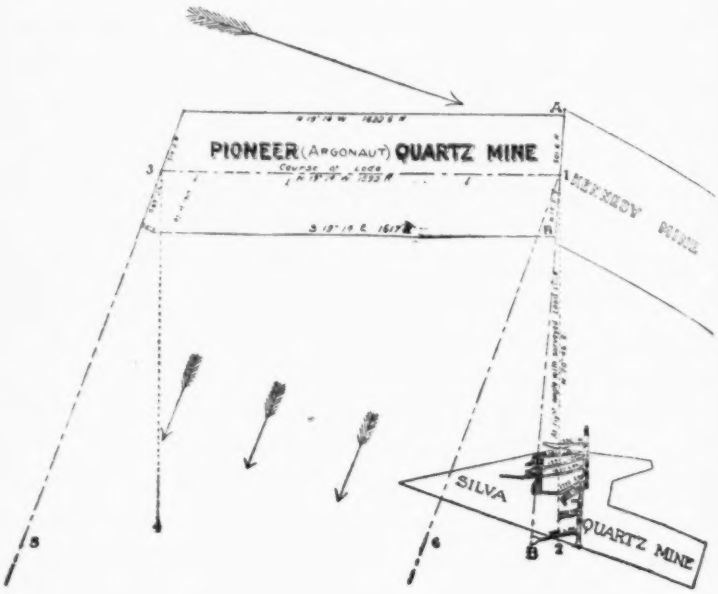

FIGURE 2.

The Court holds :

(1) That the Argonaut Company was entitled to all the rights which would attach under the Act of 1866 and to any additional rights which inured to such locations under the Act of 1872.

(2) The Act of 1866 did not require parallel end-lines, and the failure to so parallel them in the Pioneer location does not deprive that claim of extralateral rights.

(3) The extralateral rights on lodes located under the Act of 1866, where end-lines are not parallel, is to be defined, as suggested in the Eureka case, by drawing lines at right angles to the general course of the lode at the extreme points on the lode within the location.

The ore bodies in controversy are within the end-line planes of the Pioneer, and also within extralateral right planes constructed at right angles to the general course of the lode through the extreme points on the lode within the location. Therefore, such ore bodies belong to the Argonaut Company.

(3) There is no law to support the contention of plaintiffs in error, that because the description in the Pioneer patent commences at the south end of the claim, and the south end-line was first run, the inequalities arising through diverging end-lines should be adjusted by drawing a produced line (1—6 in Figure 2) parallel to the produced south end-line (3—5).

Judgment of the Court below was affirmed.

The writ of error brings to this court the record considered by the Supreme Court of California, and necessarily the arguments here will follow the general lines of those presented to the Court below.

We respectfully submit the following points and authorities in support of our several contentions:

I.

The title of the Argonaut Mining Company to the Pioneer or Argonaut Mine originated, ripened and became vested under the Act of July 26, 1866. This Act did not, either in terms or inferentially, require end-lines to be parallel, and no consequence is attached to a deviation from such parallelism. This rule has been announced repeatedly by this Court and other tribunals. It is no longer an open question.

The genesis of the Argonaut Company's title, of necessity, antedated the passage of the Act of May 10, 1872.

It appears from the agreed statement of facts (Par. VI, Record, p. 14) that application for patent was filed in the Land Office at Sacramento, January 13, 1871. The precise date of the location of the claim upon which the application was based does not appear in the record; but as, under the congressional law then in force, commonly called the "Lode and Water Law," approved July 26, 1866, an application for patent could be predicated only on a claim to a vein or lode which had been previously occupied and improved (14 Stats. at Large, p. 251) it follows, necessarily, that the origin of the title antedated January 13, 1871.

It also appears from the record (Par. XV., Agreed Statement, Record, p. 25) that the patent proceeding culminated in final entry, payment of the purchase price and issuance of certificate of purchase, February 23, 1872, while the Act of 1866 was still in force. This act remained in full force until superseded by the Act of May 10, 1872.

Plaintiff in error objected before the trial court to the materiality and relevancy of these facts, urging that the patent was the measure of our rights, and that antecedent steps taken in

the patent proceeding were not to be considered. This proposition would undoubtedly be true if those facts were introduced for the purpose of either limiting or enlarging the scope of the patent, or varying or modifying its terms. Such, however, was not the object; nor were such facts considered by the court below for any purpose other than to show the *date to which the title derived through the patent relates.* For this purpose the evidence was perfectly legitimate and proper.

It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location on which the patent proceeding is based.

Heydenfeldt vs. *Daney G. & S. M. Co.*, 93 U. S. 634, 641;
St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647;
Deffeback vs. *Hawke*, 115 U. S. 392, 405;
Jacob vs. *Lorenz*, 98 Cal. 332, 340;
Silver Bow M. & M. Co. vs. *Clark*, 5 Mont. 378, 422;
Talbott vs. *King*, 7 Mont. 66, 106;
Smoke House Lode Cases, 6 Mont. 397, 402;
Deno vs. *Griffin*, 20 Nev. 249, 252;
Eureka Case, 4 Sawy. 302, 317.

In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which the title originated.

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647;
Kahn vs. *Old Telegraph Co.*, 2 Utah, 174, 188.

Said this court, speaking through Justice Field:

"This doctrine, as to the conclusiveness of a patent, isnot inconsistent with the right of the patentee, often recognized by this Court, to show the date of the original proceeding for the acquisition of title, where it is not stated in the instrument,

as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims."

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636, 647.

The patent to the Pioneer mine recites the date of the final entry and payment, February 23, 1872.

Trans., fol. 150.

This of itself establishes the fact that the Pioneer title was perfected while the Act of 1866 was in full force, but, of course, fails to show any antecedent step in the inauguration of the right.

We are authorized, therefore, to state that on the face of the record the title of the Argonaut Company to the Pioneer mine is referable to the Act of 1866, and that this act is a muniment of the title of defendant in error. It remains for us to determine the underlying principles of the Act of 1866, the interpretation given to it by the courts, and apply the rules announced to the case at bar.

Underlying Principles of the Act of July 26, 1866.

A full text of the Act of July 26, 1866, is found in 14 U. S. Stats. at Large, p. 451.

This Act was but a crystallization of the miners' rules and customs, which, prior to congressional action, formed the Pacific Coast common law of mines.

Jennison vs. *Kirk*, 98 U. S. 453, 456;
Broder vs. *Natoma Water Co.*, 101 U. S. 274, 276;
Chambers vs. *Harrington*, 111 U. S. 350, 352;
N. P. R. R. vs. *Sanders*, 166 U. S. 620, 634.

Under the local rules, as well as under the Act of 1866, the lode was the principal thing, and the surface was, in reality, an incident.

Johnson vs. *Parks*, 10 Cal. 447, 449.

Patterson vs. *Hitchcock*, 3 Colo. 533, 534.

Wolfley vs. *Lebanon Min. Co.*, 4 Colo. 112, 116.

Walrath vs. *Champion M. Co.*, 63 Fed. 552, 556.

Upon this subject we may quote with profit from a recent decision of this Court, Justice Brewer speaking for the Court:

"The purpose herein (the Act of 1866) manifested was the conveyance of the vein, and not the conveyance of a certain area of land, within which was the vein. * * * Nowhere was there any express limitation as to the amount of land to be conveyed. * * * Obviously, the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area, or the form of the surface location, leaving the land department in each particular case to grant so much of the surface 'as was fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine."

"As might be expected, the patents issued under this statute described surface areas very different, and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight, or in a curved irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules, giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area."

Del Monte M. and M. Co. vs. *Last Chance M. Co.* 171 U. S. 55, 64.

Justice Field, speaking for himself and the judges who participated with him in the trial of the Eureka case, said:

"It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or

lode, is, under the Act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course or to follow the dips, angles and variations of the vein, or control the direction he shall take."

Eureka Case, 4 Sawy. 302, 323.

We shall have occasion presently to critically analyze and discuss the Eureka case, as, in our judgment, it presents conditions absolutely parallel to the one at bar. Our present object is simply to note the general theories of the Act of 1866, and the evolution of the principles for which we are contending.

Under this Act, end-lines were implied in the sense that they determined the points beyond which the miner might not go in his pursuit of the vein on its strike.

Before patent, he might pursue it on its course or strike to the extent of the number of feet claimed. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right, prior to patent, to follow it wherever it ran.

Johnson v. *Parks*, 10 Cal. 447, 449.

The locator could hold but one lode or vein.

Eclipse G. & S. M. Co. v. *Spring*, 59 Cal., 304, 305;

Eureka case, 4 Sawy., 302, 323;

Walrath v. *Champion M. Co.*, 63 Fed., 552;

S. C. on Appeal, 171 U. S. 293, 305;

Del Monte Min. & Mill. Co. v. *Last Chance Min. Co.*, 171 U. S. 55, 63.

In all patents issued under the Act, a recital was inserted, restricting the grant to the one vein or lode described therein, and providing that any other vein or lode discovered within the surface ground described should be excepted and excluded from the operation of the grant.

The nature of the grant authorized by this Act is defined in Section 2, which we quote:—

"And be it further enacted, that whenever any person, or association of persons, claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same, according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract, and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining sha'l be sold subject to this condition."

It was under this Act that the predecessors in title located, applied and surveyed for patent the Pioneer Mine, and made final entry and payment to the Government.

Under the Act of 1866, Parallelism of End-Lines Not Required.

The end-lines of the Pioneer are not parallel, but diverge in the direction of the dip. For this reason plaintiff in error, as heretofore observed, insists that no extralateral right attaches to the Pioneer or Argonaut claim. In other words, counsel for plaintiff in error assert that under the Act of 1866, such parallelism was essential to the enjoyment of the right to follow the vein on its downward course outside of and beyond the vertical side boundaries. In the light of the adjudicated cases we cannot conceive how counsel can, with any degree of plausibility, make this assertion. A few excerpts

from the Court decisions will suffice to refute their contention on this point. We quote :

"In the first place, it does not appear upon what locations "the patents were issued. They may have been, and prob- "ably were, issued upon locations made under the Act of "1866, *where such parallelism in the end-lines of surface loca-* "*tions was not required.*"

Judge Field, in Eureka case, 4 Sawy. 302, 319 ;

Affirmed *Richmond M. Co.* vs. *Eureka M. Co.*, 103 U. S. 839-847.

"Under the Act of 1866 parallelism in the end-lines of a "surface location was not required."

Judge Field, in Iron Silver Mining Co. vs. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

"Under the Act of 1866 parallelism of end-lines was not "required."

Walrath vs. *Champion Co.*, 63 Fed. 552, 556.

"The location was made under the law of 1866, which did "not require parallelism of end-lines."

Con. Wyoming G. M. Co. vs. *Champion M. Co.*, 63 Fed. 540, 550.

"When those locations were made (1866) there was no law "requiring such parallelism."

Carson City Gold and Silver Min. Co. vs. *North Star M. Co.*, 73 Fed. 597, 599.

"The Act of 1866, *under the provisions of which the patent* "*in this case was applied for*, and under which the rights of "defendant in error accrued, did not require parallelism of "end lines."

Carson City G. and S. M. Co. vs. *North Star M. Co.* (*C. C. A.*), 83 Fed. 658, 669;
Certiorari denied by U. S. Supreme Court, May, 1898.

The same doctrine was practically reiterated by this Court in a recent case. In speaking of the Act of 1872, which, in specific terms, required end lines to be parallel, Justice Brewer, for the Court, said:

"There is no inherent necessity that the end lines of a "mining claim should be parallel; yet the statute (Act of "1872) has so specifically prescribed."

Del Monte Min. & M. Co. vs. *Last Chance M. Co.*, 171 U. S. 55, 67.

From which the inference is irresistible that parallelism is not essential, unless the statute so declares, which the Act of 1866 did not.

As the doctrine so frequently announced had its origin in the exigencies of the Eureka case, it is expedient to present that case as it appeared to the eminent Judges who tried it, and to this Court before whom it was taken on appeal.

This will enable us to compare the facts and circumstances of that case with those of the case at bar.

The Eureka Case and Its Striking Resemblance to the Case at Bar.

Accompanying the decision of the Circuit Court in the Eureka case is a diagram which represents the principal features of it. From this and the original exhibits used at the trial, and for the purpose of presenting the Argonaut-Kennedy case to the trial judge, we prepared a map, upon which is delineated such physical features as will explain the precise questions involved and will illustrate the striking similarity between that case and the one at bar. This we herewith reproduce in miniature as "Figure 3."

This figure is practically a reproduction of "Exhibit U" attached to the findings and judgment-roll in the Eureka case.

FIGURE 3.

The Richmond Company owned the Richmond, Tip Top and Lookout claims, lying northwesterly of the line W–X, and the Eureka owned the Nugget, Champion, At Last and Lupita, or Margaret, southeasterly of that line. This line W–X was a common boundary between the two companies.

The ore body in dispute was the "Potts Chamber," which was bisected by a vertical plane drawn through the common boundary, W–X, and that line produced in the direction of C. The end lines of the At Last and Lupita were not parallel, but *diverged* in the direction of the dip, as represented by the lines W–X–C, and Y–Z–Z^1. The Richmond Company also owned the Utah, Arctic and Atlantic locations overlying the dip of the lode, and underneath the surface of which was found the ore body in dispute. As to the position of the top or apex of the vein, a mere casual reading of Judge Field's opinion (4 Sawy. 302) shows the lode to have been quite a broad mineralized zone, having tops and apices in all the locations of the Eureka Company. If there was no apex in either the At Last or Lupita, the question of non-parallelism of end-lines could not have been injected into the case, as the end-lines of the Champion were parallel.

The contention of the Richmond Company, eliminating the question of structural geology, over which the battle raged fiercely, and other matters not pertinent to this discussion, was as follows:

(1) That the Richmond held the prior title. The locations of the Richmond and Tip Top, to which the patents related, were made in 1869. Its patents called for a certain number of feet of the lode. It contended that it had a right to follow the vein *on its strike* beyond the end line W–X to the linear extent claimed.

This contention was thus expressed in the bill of exceptions settled and filed in the cause:

> "7th. That the said patents to the defendants (Richmond) offered in evidence do not, as to the special and particular lodes therein named respectively, limit or confine the defendants in the right to follow the vein or lode, with its dips, angles and variations in their depth—to

such portions thereof as lie between vertical planes drawn downward through the end lines of the location of the surface ground so continued in their own direction that such planes will intersect the exterior parts of said veins or ledges, but that such limit or restraint only applies to the veins other than the special lodes named and granted."

Note.—The evidence showed that the "special lode" referred to was the *one* lode located September 20, 1869, *i. e.* under the Act of 1866. The *other* lodes were those supposed to be granted by the Act of 1872.

It is in the light of this contention that the opinion of Judge Field is to be read.

(2) That the end-lines of the At Last and Lupita, belonging to the Eureka, were not parallel, as required by the Act of 1872. Therefore the Eureka could not follow the lode outside of its vertical side boundary. As a corollary to this, the Richmond was entitled to the ore bodies in dispute, because they were underneath the surface of the Utah, Arctic and Atlantic, which belonged to the Richmond Company.

The similarity between the facts in the Eureka case and the one at bar is obvious.

When we compare the chronology of the two cases, we find that Judge Field in his opinion (4 Sawy. 319) says that it did not appear when the Eureka locations were made. He *assumed* they were made under the Act of 1866. There was a deed in evidence executed by the Eureka Company to the Richmond Company, dated April 26, 1871, which recited the ownership by the Eureka Company of the Champion, At Last, and Margaret (Lupita) claims, which made the inference conclusive that they were located prior to that date, *i. e.*, under the Act of 1866.

Speaking of this, this court said in its opinion affirming the judgment:

> "The Eureka Company at some time *before April 26,*
> "*1871,* but at what precise date does not appear, became
> "the owner of the Champion, At Last, and Margaret
> "(Lupita) claims."

Richmond vs. *Eureka*, 103 U. S. 839, 841.

There is no room for ambiguity or inference as to when the Pioneer or Argonaut was acquired. It had passed to entry under the Act of 1866, and this fact appears on the face of the patent.

With reference to the position of the ore bodies in dispute in the Eureka case, the facts were found by the trial court as follows :

> "17th. That the mining ground in dispute is situated
> "within the lode or ledge as hereinbefore described,
> "and within planes drawn vertically down through the
> "end lines of the plaintiff's patented location of the
> "Champion claim, and within planes drawn vertically
> "down through the extreme points of the patented loca-
> "tions of the At Last and the Lupita or Margaret claims
> "at right angles to the course or strike of the said lode
> "or ledge, and produced so as to follow the dip of the
> "lode. The top or apex of said lode is within the sur-
> "face lines of said patents to the plaintiff, and said lode
> "dips at right angles to its course, and on such dip ex-
> "tends under the surface of the Utah and Arctic claims
> "of defendants."

This finding was undoubtedly made in order to apply the reasoning of Judge Field given in his opinion when speaking generally of end-lines under local rules :

> "Lines drawn vertically down through the ledge or
> "lode at right angles with a line representing this gen-
> "eral course at the ends of the claimant's location will
> "carve out, so to speak, a section of the ledge or lode
> "within which he is permitted to work and out of which
> "he cannot pass."

In awarding judgment in favor of the Eureka Company, the trial court said :

> " Inasmuch as the ground in dispute lies within planes " drawn vertically downward through the end-lines of " the plaintiff's (Eureka) patented locations, our conclu- " sion is that the ground is the property of the plaintiff, " and that judgment must be for its possession in its " favor."
>
> *Eureka case*, 4 Sawy., at p. 325.

This judgment was affirmed by the Supreme Court of the United States, from whose opinion we select the following extracts:

> " The particular mining ground in dispute is situated " within the zone of limestone which has been described " and within planes drawn vertically down through the " end-lines of the Champion Company as patented, and " within planes drawn vertically down through the ex- " treme points of the patented locations of the At Last " and Margaret claims at right angles to the course or " strike of the zone and produced so as to follow its dip."
>
> " The top or apex of the zone is within the surface " lines of the patents to the Eureka Company, and the " zone dips at right angles to its course and on such dip " extends under the surface of the Arctic and Utah " claim. * * * The end lines of the surveys of the " At Last and Margaret (Lupita) claims as patented are " not parallel with each other."
>
> *Richmond* vs. *Eureka*, 103 U. S. 839, 844.

> " The finding that the ground in dispute is within the " end-lines and that the apex is within the surface lines " settles the rights of the parties between themselves *as* " *well under their patents* as under their compromise agree- " ment."
>
> *Id.*, p. 847.

This case, and those from which we have heretofore quoted, conclusively establish the proposition announced by both trial and appellate courts in the case at bar, that under the Act of

1866 end-lines were not required to be parallel, and a failure to so parallel them does not prevent the exercise of the extra-lateral right.

The only case where this question was involved which has found its way into the courts since the decision of the Eureka case is *Carson City G. & S. M. Company* vs. *North Star*, tried before Judge James H. Beatty, sitting as Circuit Judge, Ninth Circuit (73 Fed. 597), and reviewed and affirmed by the Circuit Court of Appeals (83 Fed. 658). *Certiorari* was applied for to this Court and denied in May, 1898. We herewith reproduce an illustration of that case for convenient reference (figure 4).

FIGURE 4.

The title to the North Star originated under the Act of 1866. It was a composite of a number of claims. Application for patent was pending at the date of the passage of the Act of 1872. The patent was not issued until long after the Act was passed. The only difference between the North Star case, the Eureka case and the one at bar is found in the fact that in the North Star case the end-lines are converging instead of diverging in the direction of the dip. To defeat the North Star extra-lateral right, non-parallelism of the end-lines was urged by the Carson City (Irish-American) Co., underneath whose surface the vein penetrated. The contention met the same fate as in the Eureka case.

"Under the Act of 1866 end-lines were not required to be parallel."

Carson City vs. *North Star*, 73 Fed., 597, 599;
Id., on appeal, 83 Fed. 658, 669.
Certiorari denied by this court May, 1890.

As heretofore noted the doctrine was also affirmed in
Iron S. M. Co. vs. *Elgin*, 118 U. S. 196, 208;
Walrath vs. *Champion*, 63 Fed. 552:
Con. Wyoming vs. *Champion*, 63 Fed. 540, 550.

Cases Cited by Plaintiff in Error Do Not Overthrow or Modify the Doctrine of the Eureka Case.

The doctrine of the Eureka case, so far as it applies to locations made under the Act of 1866, has never been shaken.

Counsel for plaintiff in error urges that it was practically overruled by *Iron S. M. Co.* vs. *Elgin*, 118 U. S. 196, commonly known as the "Horseshoe case."

Judge Field also wrote the opinion in this case, and it is sufficient to quote the following excerpt from that decision:

"Under the Act of 1866, parallelism in the end-lines "of a surface location was not required; *but where a* "*location has been made since the Act of* 1872, such "parallelism is essential to the existence of any right in "the locator or patentee to follow his vein outside of the "vertical planes drawn through the side lines. His "lateral right by the *statute* is confined to such portion "of the vein as lies between such planes drawn through "the end lines and extended in their own direction; that "is, between parallel vertical planes. It can embrace "no other portion."

There is no question but what the locations involved in the "Horseshoe case" were made under the Act of 1872. It is a matter of current history, that the carbonate deposits of Leadville, where the property in controversy is situated, were not discovered until 1874. In addition to this the original complaint filed in the case (see statement of the case preceding opinion, 118 U. S. 196), disclosed the title under *location*, and necessarily disclosed the date of such location. The patent was issued after the suit was brought, and title thereunder set up by supplemental pleading. Judge Field bases his decision upon the Statute of 1872, applied to *locations* made under it.

Certain other cases cited by appellant's counsel, as either modifying or overruling the doctrine of the Eureka case, deserve passing notice.

Walrath vs. *Champion*, 171 U. S. 293. For purpose of illustration we reproduce in miniature the map (Figure 5) of the properties involved in this case.

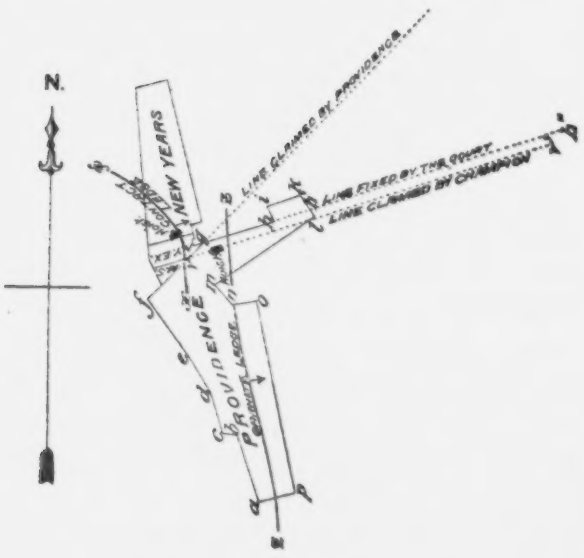

FIGURE 5.

The Providence patent issued under the Act of 1866 was for the irregular shaped surface shown in the figure and granted but the *one lode* Z–Z, as this was all that could be granted under the Act of 1866. Section 3 of the Act of May 10, 1872 (17 Stat. at Large, p. 91), granted to the owner of the patent *all other lodes* which were thereafter discovered within the surface boundaries. Another ledge was thereafter discovered—the contact ledge X–X. The only title to this ledge, acquired by the patentee of the Providence, was the grant contained in the Act of 1872. The only controversy in the case was over the newly discovered X–X ledge. The Providence insisted that its extralaterial rights should be defined by the line f–g, because the new ledge crossed it. This line was not an end-line of the original location. The illustration f–g, from the Champion counsel's brief, displayed on page 72 of the brief of plaintiff in error, was an illustration of the pore-

ative force of the Act of 1872. We contended in the appellate courts in that case that the extralateral rights of the Providence on the newly discovered ledge were limited and defined by the end-lines of the original location—a–p and g–h—according to the mandate of the Statute of 1872, under which, alone, the Providence acquired title to such ledge. This view was upheld.

The Act of 1866 was not involved in that case, only to the extent of determining where, under the patent issued under that act, the end-lines of the location were, and to refer the supplemental rights conferred upon that location by the act of 1872 to those end-lines, as defined in such patent.

We fail to see wherein this militates against or in any way modifies the doctrine of the Eureka case.

Flagstaff vs. *Tarbet*, 98 U. S. 463, was a case where the patent called for 2600 feet of the lode, but instead of locating along the vein it was located *crosswise*, so as to include only 100 feet of the vein within its surface boundaries. The vein crossed the lines established by the locator as *side-lines*, which became in law the *end-lines*. The width allowed to surface location under the local rules was 100 feet. The following diagram (Figure 6) will illustrate the facts of this case:

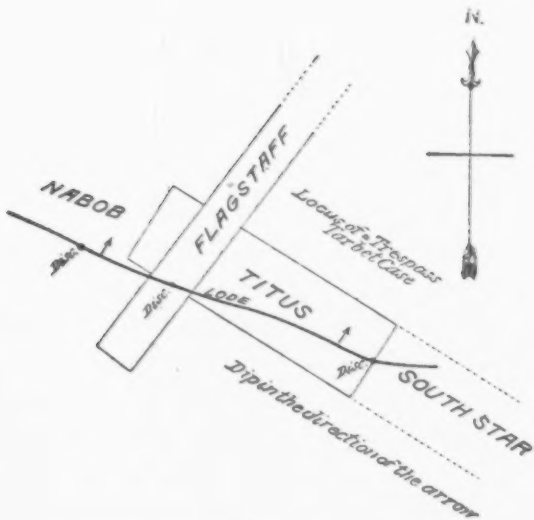

FIGURE 6.

The Flagstaff Company asserted its rights to follow the lode out of and beyond its legal end-lines, just as the Richmond claimed the right to do in the Eureka case. The Flagstaff case simply follows the Eureka case, denying any such right.

The case of *Argentine* vs. *Terrible*, 122 U. S. 478, the facts of which are illustrated by Figure 7, is a duplicate of the

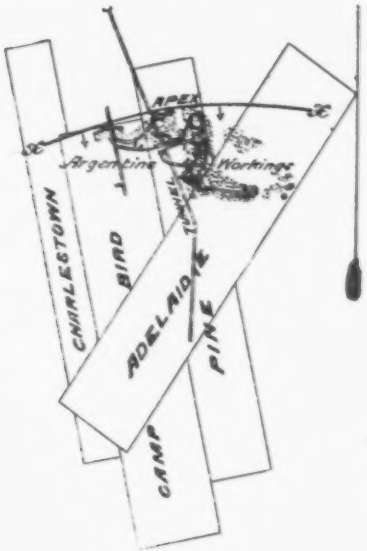

FIGURE 7.

Flagstaff case, only that it arose out of locations made under the Act of 1872. The owner of the Pine crossed over with its workings into the Adelaide, asserting its right to follow the vein on the *strike* out of its boundaries. It was another attempt to reach out beyond vertical planes drawn through the legal end-lines, and, as in the Eureka case, it failed.

We fail to observe any modification of the doctrine announced in the Eureka case, that "under the Act of 1866 end-lines were not required to be parallel." This language, so often repeated by the courts in comparing the Act of 1866 with the Act of 1872, is certainly not meaningless. If it means anything, it means that the extralateral right is not to be denied to locators under the first Act, if the end-lines of the location are not parallel.

We shall have occasion to again refer to the Eureka case when dealing with the "right angle" theory exhibited in the illustration accompanying the decision in *Kinney* vs. *Cons. Virginia M. Co.*, 4 Sawy. 382, reproduced on page 59 of the brief of plaintiff in error, and commented on by counsel for plaintiff in error at page 57 of their brief.

II.

Although the end lines were not required to be parallel under the Act of 1866, yet, if by any process of reasoning any limitation upon the extralateral right was imposed upon the locator's title (e. g., "right angle" limitation) by reason of the divergence of the end-lines, the limitation was removed by the Act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end-line planes of such location, as it then existed.

We quote so much of Section 3 of the Act of May 10, 1872 as will serve to illustrate this proposition:

> "The locators of all mining locations *heretofore* made
> " * * * on any mineral vein, lode or ledge on the
> " public domain, their heirs or assigns, where no adverse
> " claim exists at the passage of this Act, so long as they
> " comply with the laws of the United States, and with
> " state, territorial and local regulations not in conflict
> " with the laws of the United States governing their
> " possessory title, shall have the exclusive right of pos-
> " session and enjoyment of all the surface included within
> " the lines of their locations, and of all veins, lodes and
> " ledges throughout their entire depth, the top or apex
> " of which lies inside of such surface lines extended
> " downward vertically, although such veins, lodes or
> " ledges may so far depart from a perpendicular in their
> " course downward as to extend outside the vertical lines

" of such surface locations. But their right of possession
" to such outside parts of such veins or ledges shall be
" confined to such portions thereof as lie between vertical
" planes drawn downward, as above described, through
" *the end-lines of their locations*, so continued in their own
" direction that such planes will intersect such exterior
" parts of such veins or ledges. And nothing in this
" section shall authorize the locator or possessor of a vein
" or lode which extends in its downward course beyond
" the vertical lines of his claim to enter upon the surface
" of a claim owned or possessed by another."

The Pioneer claim had been located, surveyed for patent, and final entry had been made when this provision of the law was passed. The end-lines of a location are those crossed by the lode.

Flagstaff M. Co. vs. *Tarbett*, 98 U. S. 463, 467;
Argentine M. Co. vs. *Terrible M. Co.*, 122 U. S. 478, 485;
King vs. *Amy & Silversmith M. Co.*, 152 U. S. 222, 228;
Del Monte Mining & Milling Co. vs. *Last Chance*, 171 U. S. 55, 64;
Eilers vs. *Boatman*, 3 Utah, 159, 167;
Stevens vs. *Williams*, 1 Mor. Min. Rep. 557, 562;
Tombstone M. & M. Co. vs. *Wayup M. Co.*, 25 Pac. 794, 796;
Watervale M. Co. vs. *Leach*, 33 Pac. 418, 421;
Colorado Central vs. *Turck*, 50 Fed. 888, 896 (S. C. on rehearing, 54 Fed. 262, 267);
Tyler Min. Co. vs. *Sweeney*, 54 Feb. 284, 294;
New Dunderberg vs. *Old*, 79 Fed. 588, 606.

The lines of the Pioneer, which are crossed by the lode are, on the north, the common boundary between the Kennedy and Pioneer, viz: the line A—*B* on Exhibit A and the one at the south end. It is agreed that the lode crosses both of these lines.

Par. XXI, Agreed Statement, Trans., fols. 171-2.

This Act of 1872 was framed on entirely new theories. As was said by the present Chief Justice of the Supreme Court of California, when occupying a seat on the Supreme bench of Nevada:—

> "Disagreeable as the awakening may be, it is time we "are opening our eyes to the fact that a new system has "been introduced."
>
> *Gleason* vs. *Martin White M. Co.*, 13 **Nev. 442, 459.**

It is unnecessary to comment on all the changes introduced by the new system. It will suffice to invite attention to those which bear directly on the questions under discussion.

The old law was framed upon the theory that the vein was the principal thing, and the surface a mere incident. Under this law as stated by Judge Brewer in the Del Monte case *supra*, patents were issued to claims with irregular-shaped surfaces the lines of which, as stated by Judge Field in the Eureka case, did not define the underground rights in the vein.

The new law gave controlling effect to surface boundaries.

The old law granted but one lode; the new, all lodes whose tops or apices might be found within the surface boundaries.

Under the old law end-lines were not required to be parallel. As under the old system, inequalities between length at the surface and in depth, were possible, parallelism was made essential to the exercise of the extralateral right.

As under the old law rights had accrued and become vested, these rights were recognized and confirmed. In order to reduce the possibilities of conflict between those claiming under the old and those who might acquire rights under the new to a minimum, the Act of 1872 granted to the owners of locations held under the old law, instead of the one lode, all lodes found within their surface lines, where adverse rights had not

arisen prior to the passage of the Act. And to avoid the possibility of difficulty as to underground segments of veins, the Government granted or confirmed to the holder of locations, as they then existed, *in the absence of adverse claims*, all of the veins in depth which might be found between the end-lines of their locations. No one disputes the right of the Government to do this. The language of the grant, in this behalf at least, is not confined to locations theretofore made whose end-lines were parallel.

The provision of the Act that end-lines should be parallel, which is found in another section (Section 2, Rev. Stats. 2320) is prospective in its operation and applies to locations which are required to be made *in the form prescribed by that section.*

The end-lines of locations theretofore made were the lines which were crossed by the lode, as these lines existed at the date of the passage of the Act.

Said Judge Hawley in the case of *Walrath* vs. *Champion M. Co.*:

> "The Act of 1872, in granting all other veins that
> " were within the surface lines of previous locations,
> " did not create any new lines for such other veins,
> " nor invest the Court with any authority to make new
> " end-lines for such other veins. And it is apparent
> " from an examination of the statute that the Court has
> " no power to make a new location for every vein that
> " may be found within the surface lines of the location,
> " and thereby enlarge the rights of the original locators.
> " When the end-lines are once fixed they bound the ex-
> " tralateral rights to all the lodes that are thereafter found
> " within the surface-lines of the location. *It necessarily*
> " *follows that the end-lines* of the Providence Survey
> " (made under the Act of 1866) must be considered as
> " the end-lines of any and all other lodes or veins which
> " lie 'inside of such surface lines.' Otherwise endless
> " confusion would arise in the construction of the statute."
>
> 63 Fed. 557.

And Justice McKenna, speaking for this Court in the same case, says:

> "Appellant's right on the contact vein is given by this "statute. What limits this right extralaterally? The "statute says, *vertical planes drawn downward through the "end-lines of the location.* What end-lines? Those of "and as determined by the *original location and lode*, the "Circuit Court of Appeals decided. Those determined "by the direction of the newly discovered lodes, regard-"less whether they were originally intended as end-lines "or side-lines, the appellant, as we have seen, contends. "The Court of Appeals was right. Against the conten-"tion of the appellant the letter and spirit of the statute "oppose, and against it the decisions of this Court also "oppose."
>
> *Walrath* vs. *Champion Min. Co.*, 171 U. S. 293, 306.

When the Act of 1872 was passed, the Pioneer claim had passed to entry. Its survey had fixed the lines as shown in the plat, Exhibit A. The faith of the Government was pledged to the issuance of its patent according to that survey. Is there any room for doubt as to what "end-lines" of the Pioneer the Act of 1872 referred to? There is no ambiguity in the language. We know of no canon of statutory interpretation that will enable appellant to distort its meaning into a requirement that we should retrace our steps, resurvey our claim, and readjust our lines before we could obtain a grant of the extralateral right. Appellant claims no rights which were adverse to the Pioneer Company at the date of the passage of the Act of 1872. The Kennedy Company's claims, under the Silva surface title overlying the dip, originated in 1892, twenty years after the passage of that Act. How can it be heard to complain?

III.

The title evidenced by the certificate of purchase issued prior to the passage of the Act of 1872, was the complete equitable title equivalent for all practical purposes to the issuance of a patent. Congress could not deprive the purchaser of any rights acquired under that certificate, nor cast upon such purchaser any additional burden. It is quite manifest, however, that Congress never intended that the estate of any mining locator held prior to May 10, 1872, should suffer any diminution or curtailment by reason of the Act passed on that day.

The first proposition involved in the foregoing statement is almost elementary.

Plaintiff in error asserts that although the Pioneer claim as located and surveyed under the Act of 1866 had been purchased and entered for patent prior to the passage of the Act of 1872, yet nevertheless, the Act of 1872 required its owners to go into the field and reform the surface lines under penalty of the entire loss of the extralateral right which they confessedly owned prior to the passage of the Act of 1872. In other words the Act of 1872 required the Pioneer owners to go into the field, resurvey the claim, readvertise, and in fact commence proceedings *de novo* in the land office, under the penalty of losing the rights which the Government had guaranteed by the issuance of its certificate of purchase.

In the first place, if Congress had the power to impose any such additional burdens upon the complete, equitable title, it would have manifested its intention to do so unequivocally.

In the next place, the Act of 1872 specially preserved all pre-existing rights, thus manifesting the intention of Congress not to impose any additional burdens on prior claimants.

A similar question was before the Supreme Court of California in a recent case, wherein that Court, speaking as in the case at bar through Justice Temple, announced the view that where a mining claim had passed to entry prior to the passage of the Act of 1872, to insist that owners of such claims were compelled to submit to the insertion in their patents of reservations not required *or* authorized by the Act under which the certificate was issued, would violate the provisions of section 16 of the Act of 1872, "that nothing contained in this Act should be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Crane's Gulch Min. Co. vs. *Scherrer*, 66 Pac., 487.

The language of the Circuit Court of Appeals, 8th Circuit, in a case involving an entry and patent in all respects similar to the Pioneer patent, is quite pertinent. After referring to the acts to be performed by an applicant for a patent under the Act of 1866, the Court says:—

> "The claimant of the Frostberg lode had done all "this before the Act of 1872 was passed. He had des- "ignated the boundaries of the claim. It had been sur- "veyed and marked on the ground. His notice of "intention to apply for a patent had been given. No "adverse claim had been filed in the land office, and "on February 27, 1872, he had entered it for patent. . .
>
> "When the Act of 1872 was passed he was already "entitled to the Frostberg lode and to the surface de- "scribed in his claim under the Act of 1866. . . .
>
> "The patent which the department issued in 1876 "was a judgment of that tribunal that no such (adverse) "claim did exist on May 10, 1872, and that no adverse "rights would be affected by issuing it in accordance "with the provisions of the Act of that date.
>
> "It is at the same time a judicial determination of "these questions and a conveyance of the legal title to "every lode or vein whose apex lay within surface "boundaries of the patented claim extended downward "vertically."

New Dunderberg Min. Co. vs. *Old*, 79 Fed. 603.

Judge Nicol, who tried the case at bar, presented his views on this subject quite fully. These views and the authorities cited by him will be found in his opinion printed in full as an appendix to this brief.

We shall limit ourselves to quotations from a few of the leading cases discussed in that opinion.

> " By the mining laws of the United States three dis-
> " tinct classes of title are created, viz: 1—Title in fee
> " simple; 2—Title by possession; 3—The complete
> " equitable title. The first vests in the grantee of the
> " Government an indefeasible title, while the second
> " vests a title in the nature of an easement only. The
> " first being an absolute grant by purchase and patent
> " without condition, is not defeasible, while the second,
> " being a mere right of possession and enjoyment of
> " profits without purchase and upon condition, may be
> " defeated at any time by the failure of the party in
> " possession to comply with the condition, viz: To per-
> " form the labor or make the annual improvements
> " required by the statute. The equitable title accrues
> " immediately upon purchase, for the entry entitles the
> " purchaser to a patent, and the right to a patent once
> " vested is equivalent to a patent issued."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 428.

> " When the price is paid the right to a patent immedi-
> " ately arises. If not issued at once, it is because the
> " magnitude of the business in the Land Department
> " causes delay. But such delay, in the mere adminis-
> " tration of affairs, does not diminish the rights flowing
> " from the purchase, or cast any additional burdens on
> " the purchaser, or expose him to the assaults of third
> " persons."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 431, 432.

> " The right to a patent once vested is treated by the
> " Government, when dealing with the public lands, as
> " equivalent to a patent issued. When, in fact, the patent
> " does issue it relates back to the inception of the right
> " of the patentee, so far as may be necessary to cut off
> " intervening claimants."

Stark vs. *Starr*, 6 Wall. 402.

"Lands which have been sold by the United States "can in no sense be called the property of the United "States. They are no more the property of the United "States than lands patented. So far as the rights of "the purchaser are considered, they are protected under "the patent certificate as fully as under the patent. "* * * When sold, the Government, until thepatent "shall issue, holds the mere legal title for the land in "trust for the purchaser."

Carroll vs. *Safford*, 3 How. 441.

"A receipt and certificate of purchase from the "United States land office is the equivalent of a patent."

Con. Wyoming G. M. Co. vs. *Champion M. Co.*, 63 Fed. 540;

Walrath vs. *Champion*, 63 Fed. 552.

"By the payment and acceptance of the purchase "money the claimant has performed everything to be "done by him, and the purchase has been completed. "The payment, receipt of the purchase money, and the "issuing of a receipt and certificate of entry therefor, "constitute an entry of the land. The contract of pur- "chase is executed and the land is his, and no longer "belongs to the Government. The conveyance has not "been made, but the Government of the United States "only holds the legal title in trust for the purchaser. "The land no longer constitutes a part of the public "domain. The United States have ceased to have any "proprietary interest in it. It is henceforth private prop- "erty. * *"

Peo vs. *Shearer*, 30 Cal. 645, 648, cited in

Lux vs. *Haggin*, 69 Cal. 429;

See also *Crane's Gulch Min. Co.* vs. *Scherrer* (Cal.) 66 Pac. 487.

"The United States has ceased to have any pecu- "niary interest in it. They hold the naked, dry, legal "title for the holder of the certificate."

Hamilton vs. *Southern Nev. Min. Co.*, 13 Sawy. 113; 33 Fed. 562.

Union M. Co. vs. *Danberg*, 2 Sawy. 455.

Amador Medean Gold M. Co. vs. *South Spring Gold Min. Co.*, 13 Sawy. 523; 63 Fed. 668, 670.

Aurora Hill Cons. Min. Co. vs. *85 Min. Co.*, 12 Sawyer, 355; 34 Fed. 515.

"The rule is well settled by a long course of decisions, "that when public lands have been surveyed and placed "in the market, or otherwise opened to private acquisi- "tion, a person who complies with all the requisites "necessary to entitle him to a patent in a particular lot "or tract is to be regarded as the equitable owner thereof. "* * * The public faith has been pledged to him. * * *"

Wirth vs. *Branson*, 98 U. S. 118.

"There is no conflict in the rulings of this Court upon "the question. With one voice they affirm that when "the right to a patent exists, the full equitable title has "passed to the purchaser, with all the benefits, im- "munities and burdens of ownership, and no third party "can acquire from the Government interests as against "him."

Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434.

A patent when issued relates back to the first initial valid step which is the foundation of the right and in pursuance of which the patent is issued.

Kahn vs. *The Old Telegraph Min. Co.*, 2 Utah, 174, 188; 11 Mor. Min. Rep. 645, 652;

Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434;

Stark vs. *Starr*, 6 Wall. 402, 418;

Ely vs. *Frisbie*, 17 Cal. 250, 260;

Yount vs. *Howell*, 14 Cal. 465, 470;

Touchard vs. *Crow*, 20 Cal. 150, 161;

Aurora Hill Co. vs. *85 Min. Co.*, 12 Sawy. 355, 360; 34 Fed. 515, 518;

Eureka Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302, 317.

In striving to maintain the assertion that the Act of 1872 was retroactive, and placed upon the Pioneer Company, after it had received its certificate of purchase, the duty of reforming its lines, counsel for plaintiff in error urge that the Act of 1866 of itself contained a reservation to Congress of the power to take away something which might be acquired by complying with its provisions.

Counsel says in this behalf (p. 42 of their brief):

> "Recognizing the imminence of the danger that "might lurk in the hastily constructed Act of 1866 and "the necessity for flexibility in the scheme, the Congress "reserved in Sections 1 and 5 the power to make such "changes, laws, regulations and amendments as to supply "the additional means necessary to the complete de- "velopment of the mineral resources of the country, and "made all titles acquired under the act and patents "issued *express this reservation.*"

This is somewhat ambiguous, but so far as it presumes a reserved right in Congress to change its policy with reference to mineral lands and modify or repeal existing laws, so as to correct possible evils, there is no serious objection to it. Congress would have that right without specially reserving it. But what reservations does counsel refer to? They rely upon Sections 1 and 5 of the Act as constituting these so-called *reservations.*

We quote from these sections:

> "SECTION 1. * * * That the mineral lands of "the public domain, both surveyed and unsurveyed, are "hereby declared to be free and open to exploration and "occupation by all citizens of the United States and "those who have declared their intention to become citi- "zens, subject to such regulations as may be prescribed "by law, and subject also to the local customs or rules of "miners in the several mining districts so far as the "same may not be in conflict with the laws of the United "States."

"SEC. 5. * * * That as a further condition of "sale, in the absence of necessary legislation by Con- "gress *the local legislature of any state or territory may* "*provide rules for working mines, involving easements,* "*drainage, or other necessary means to their complete de-* "*velopment;* and these conditions shall be fully expressed "in the patent."

We candidly confess our inability to appreciate the logical connection between counsel's statement and these provisions of the statute.

These so-called reservations or conditions certainly cannot be construed as sanctioning the doctrine that Congress or the states or local district organizations could destroy, curtail or abridge a right given by United States patent, and a certificate of purchase is to all intents and purposes the equivalent of a patent. There is a marked absence of coherence between counsel's statement as to the effect of the Act and the language of the Act itself.

The supervisory power of the Land Department after the issuance of a certificate of purchase to recall the certificate for the purpose of correcting errors or omissions, and making it conform to the law *under which it is issued*, or to prevent the perpetration of a fraud, is altogether a different thing from recalling it and inserting in the patent conditions and reservations which were not authorized by that Act.

But Congress never intended by the Act of 1872 to interfere with existing rights. The Act itself specially preserved them.

We quote the following from the Act:—

Section 9 provided as follows:—

"That sections one, two, three, four and six of an "Act granting the right of way to ditch and canal own- "ers over the public lands and for other purposes, ap- "proved July 26, 1866, are hereby repealed, *but such* "*repeal shall not affect existing rights.* Applications for

" patents for mining claims now pending may be prose-
" cuted to a final decision in the General Land Office;
" but in such cases, where adverse rights are not affected
" thereby, patents may issue in pursuance of the provis-
" ions of this Act; and all patents for mining claims
" heretofore issued under the Act of July 26, 1866,
" shall convey all the rights and privileges conferred by
" this Act, where no adverse rights exist at the time of
" the passage of this Act."

(Section 2328 *Revised Statutes.*)

In section 12 we find the following:—

" Nothing in this Act shall be construed to enlarge
" or affect the rights of either party in regard to any
" property in controversy at the time of the passage of
" this Act, or of the Act entitled 'An Act granting the
" right of way to ditch and canal owners over the public
" lands, and for other purposes,' approved July 26, 1866,
" *nor shall this Act affect any right acquired under said Act*";

And Section 16 provides,

" That all Acts and parts of Acts inconsistent here-
" with are hereby repealed; *provided that nothing con-*
" *tained in this Act shall be construed to impair in any*
" *way, rights or interests in mining property acquired*
" *under existing laws.*"

This manifests the unequivocal intention of Congress to preserve all rights previously acquired and the Act must be so construed.

Eclipse G. & S. M. Co. vs. *Spring*, 59 Cal. 304.

Crane's Gulch M. Co. vs. *Scherrer*, 66 Pac. 487.

As was said by Judge Field in the Eureka case (4 Sawy. 323):—

" The Act of 1872 preserves to the miner the rights
" acquired under the Act of 1866 and confers upon him
"additional rights."

IV.

The patent of the United States issued to the predecessor in title of the Argonaut Company in terms grants the vein throughout its entire depth between the end-lines described in the patent and shown on the plat (Exhibit A) and these lines extended in their own direction. The Land Department had jurisdiction of the subject-matter. The patent is not open to collateral attack.

We do not understand that the general doctrines as to the conclusiveness of patents is assailed by plaintiff in error. We readily concede that the validity of a patent may be attacked by showing want of jurisdiction in the Land Department to issue it, or that such patent grants something which that department had no power to convey.

The contention of plaintiff in error seems to be about as follows:

The patent was issued after the passage of the Act of 1872. After that date at least the Land Department had no power to grant extralateral rights to a claim having non-parallel end-lines.

In answer to this we have simply to reiterate what we have heretofore said that the right to the patent in this case became vested under a law which did not require end-lines to be parallel. The patent when issued confirmed these rights as well as the additional ones vouchsafed by the Act of 1872.

Or otherwise stated, the act of 1872 conferred upon locators of claims theretofore owned the right to pursue the vein in depth between vertical planes drawn through the end-lines of the location as such location then existed, regardless of the parallelism or non-parallelism of such end-lines. The patent simply followed the statute.

There is another suggestion which we consider of sufficient importance to be noted at this juncture.

There can be no question but that the Land Department had jurisdiction to pass upon the Pioneer application for patent. In the process of adjudicating the rights of the Pioneer, after the period of publication had passed, it devolved upon that Department to determine in addition to the extent of rights claimed in the vein, the quantity and form of the surface to which the applicant was entitled, or as was said by this Court, speaking through Justice Brewer in the Del Monte case:

> " Obviously the statute contemplated the patenting of
> " a certain number of feet of the particular vein claimed
> " by the locator, no matter how irregular its course, made
> " no provision as to the *surface area or the form* of
> " the surface location, *leaving the Land Department*
> " *in each particular case* to grant so much of the
> " surface as was fixed by local rules, or was in the ab-
> " sence of such rules in its judgment necessary for the
> " convenient working of the mine."
>
> *Del Monte Case*, 171 U. S., 55, 64.

It will be presumed in favor of the validity of the Pioneer patent issued upon a certificate of purchase antedating the passage of the Act of 1872, either that the local rules existing and in force in the district when the certificate of purchase was issued, permitted the Pioneer owners to take their surface in its present patented form, or that such extent and form of surface was, in the judgment of the Department, " necessary for the convenient working of the mine."

In proceedings to obtain patents it devolves upon the Land Department, in the absence of adverse claims and suits brought to determine them, to decide what rules and regulations are in force in a given district, and its decision upon the subject is final.

Parley's Park M. Co. v. *Kerr*, 130 U. S. 256, 262.

The position of counsel is practically a collateral attack on the patent.

How could we reform these surface lines so as to parallel the end-lines without cutting off some of the *surface* to which we had acquired the complete equitable title, equivalent, as against third persons at least, to a patent?

Does not the construction of the Act of 1872 contended for by counsel for plaintiff in error, entirely nullify the express declaration, thrice repeated in the law itself, that rights acquired under laws theretofore existing should not be impaired?

In the trial and appellate courts, the case of *Lakin* vs. *Dolly*, 53 Fed. 332, and *Lakin* vs. *Roberts*, 54 Fed. 461, were frequently quoted by counsel for plaintiff in error as supporting the conclusion that the Act of 1872 was a curtailment of rights acquired by locations made under the Act of 1866, and that as the Pioneer patent was issued after the passage of the Act of 1872, we could acquire no greater rights than were conferred upon locations made under that Act.

We do not find these cases referred to in their brief filed in this court. We are not in a position to determine how far this Court in its search for further light may deem it necessary or expedient to exploit the somewhat voluminous "Appendix." Therefore as a precautionary measure we deem it advisable to present our views of these cases.

We present a diagram (Figure 8) showing the Mammoth claim, the property involved in the Lakin cases, the shaded lines representing the ground as to which the Court held the patent was valid.

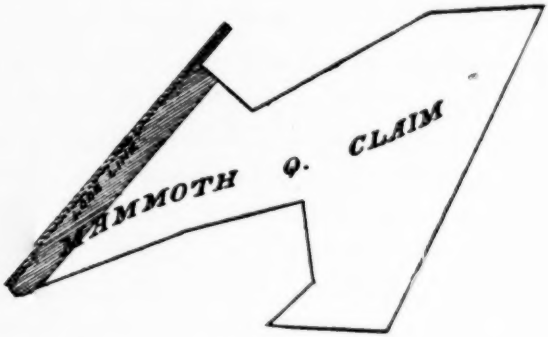

FIGURE 8.

The unshaded portion embraced the town of Johnsville, covering 252.95 acres of land connected with a location of one lode.

The application for patent was made in 1867, but no entry or payment was made until 1877.

It appeared at the trial of the case, upon an *agreed statement of facts*, that when the Mammoth claim was located there was no local rule, usage or custom authorizing surface to be appropriated in excess of 100 feet on each side of the vein, and that the unshaded area shown on the diagram *never was covered by the Mammoth location.* This was an admission which practically went to the jurisdiction of the Land Department, to grant a patent for an area in excess of the amount allowed by local rules.

At all events the case has since been twice explained by the same appellate court which handed down the opinion. The first explanation will be found in *Carson City* vs. *North Star*, 83 Fed. 658, the opinion being written by Judge Hawley, who originally decided the Lakin-Dolly case (53 Fed. 333).

In the very recent case of *Peabody Gold Mining Company* vs. *Gold Hill M. Co.*, 111 Fed. 817, the same court thus disposes of the Lakin-Dolly case:

> "The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with."

In the North Star case, as in the case at bar, the Lakin-Dolly case was urged for the purpose of defeating the North Star extralateral right, without success, however.

Counsel for plaintiff in error insisted in the courts below that the Lakin-Dolly cases were practically affirmed by this Court, because it refused to issue a writ of *certiorari*. If this be true, in the light of the facts of that case as heretofore stated, what advantage is said affirmance to the plaintiff in error?

Certiorari was also denied by this Court in the North Star case, which first explained the Lakin-Dolly case, and if the denial of such a writ by this Court is tatamount to an affirmance of the decision of the court below, we are authorized to say that this Court has approved of the explanation of the Lakin-Dolly case given by the Circuit Court of Appeals in the North Star case.

In the case of *St. Louis Smelting Co.* vs. *Kemp*, 104 U. S. 636, an attack was made upon a mining patent, on the ground that the Land Department had no jurisdiction to grant under the placer laws a surface area greater than 160 acres. And as the patent in that case purported to convey more than that, it was contended that it was void. As to this contention, the Court said (p. 646):

"A patent in a court of law is conclusive as to all mat-
"ters properly determinable by the Land Department
"when its action is within the scope of its authority; that
"is, when it has jurisdiction under the law to convey the
"land. In that court the patent is unassailable for mere
"errors of judgment. Indeed, the doctrine as to the reg-
"ularity and validity of its acts where it has jurisdiction
"goes so far that if in any circumstances under existing
"laws a patent would be held valid, it will be presumed
"that such circumstances existed."

See, also,

Tucker vs. *Masser*, 113 U. S. 203.

The Pioneer having been located under the Act of 1866, which fixed a limitation of 200 feet to each locator, was presumptively a consolidation of a number of claims on the supposed course of the vein.

St. Louis Smelting Co. vs. *Kemp*, 104 U. S. 636;

North Star case, 73 Fed. 597; 83 Fed. 658.

When these were all united in one ownership it is very easy to conceive how non-parallelism in the two extreme end-lines might result. The Carson City-North Star case is a striking illustration of this. In Figure 9 we reproduce the

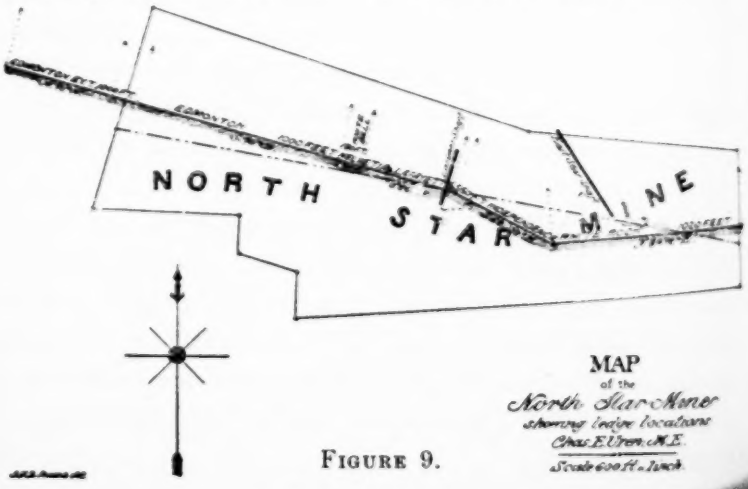

FIGURE 9.

North Star surface, delineating within it the different aggregation of claims of which it was composed. A casual inspection of this composite shows that the extreme end-lines are practically at right angles to the *local* strike across which they are drawn, but are not parallel to each other. Necessarily inequalities in depth existed between the Helvetia and Lafayette, Independence and White Rock, owing to a change in the course of the vein. If the dip of the vein were in the opposite direction we would have an illustration of how the situation might have been as to original locations of which the Pioneer was composed.

It is a matter of common knowledge that the line of outcrop of metalliferous veins is rarely ever coincident with the true strike. It is only so when the vein exposure is on a level surface. In mountainous regions this rarely ever occurs. The slopes of hills, erosions in canyons and other natural occurrences cause deflections in the line of croppings—the miner's guide in locating. The line is curvilinear or angular more often than straight.

Each successive locator of, say 200-foot locations under the Act of 1866 might draw his end-lines approximately at right angles to the strike, as shown within his location, making them substantially parallel, but when a number of claims on the same vein were consolidated it would invariably result in non-parallelism of the extreme end-lines of the composite, as it happened in the North Star case. Should the extralateral right be denied because of this?

With reference to the illustration of the end-lines on the Comstock reproduced from *Kinney* vs. *Con. Va.* (p 59 of brief of plaintiff in error), Mr. Harry I. Thornton, counsel for the Eureka Company, in his argument before this Court in the Eureka case, tells us how it was done, and also how it happened that in some instances end-lines were not parallel.

"It is a part of the history of the country," said Mr. "Thornton, "*that after expensive litigation*, the titles "upon the Comstock all of which antedate 1872 were "generally settled by each claim owner having so many "linear feet of the lode for its entire width with parallel "end-lines across and at right angles to its course, the "exceptions being as to end-lines and not as to width, in "a few special cases of purchase *or where the first locator* "*established for himself end-lines not at right angles to* "*the lode*, or permitted by acquiescence and consent or "otherwise some subsequent adjacent locator to establish "a boundary line not at right angles to the course."

So we see that this symmetrical illustration of plaintiff in error was crystallized in the crucible of litigation—and was not the result of the miners' impulse, nor pursuant to the mandate of local rules. These statements made contemporaneously with the Eureka case suggest several conditions which might be presumed to exist in favor of the validity of the Pioneer patent if any such presumption were at all necessary.

Another condition suggests itself on inspecting the plat Exhibit A.

The south end-line of the Pioneer seems to be coincident with a township line. Possibly this line was a boundary of a prior agricultural patent. Perhaps the Pioneer with its composite of locations originally claimed much more, extending over the township line, but found when it came to survey for patent that it could not obtain all that it claimed. So it applied for and received a patent with a south end-line, coincident with the township line. How plaintiff in error whose right under the Silva accrued twenty years later can legally complain of this is beyond our comprehension.

We respectfully submit that appellant is in no position to assail the patent issued to the Pioneer Company. It is impervious to such collateral attack.

V.

The Courts cannot construct end-lines. The end-lines described in a patent issued by the executive cannot be readjusted by the judiciary. The extra-lateral rights of the Pioneer must be determined by the calls of the patent in connection with the law under which the right to it became perfected and the physical facts as to the course of the vein through the ground.

Upon this subject we have only to quote from the decisions of the Supreme Court of the United States:

> "The Court cannot become a locater for the mining "claimant and do for him what he alone should do for "himself. The most that the Court can do, when the "lines are drawn inaccurately and irregularly, is to give "to the miner such rights as his imperfect location war-"rants under the statute. It cannot relocate his claim "and make new side-lines or end-lines. * * * He "must stand upon his own location, and can take only "what it will give him under the law."
> *King* vs. *Amy*, 152 U. S. 222.

A patent, of course, is but the evidence of a perfected location. It is conclusive evidence as to the limits of the location and cannot be assailed by showing that its actual boundaries were different from those described in the patent.

Waterloo M. Co. vs. *Doe*, 56 Fed. 685, 687;
S. C., 82 Fed. 45.

The question as to what were the true boundaries of the location was a question of fact to be determined by the Land Department. The patent is the judgment of that department.

Golden Reward M. Co. vs. *Buxton*, 79 Fed. 868, 874.

Citing,

Waterloo vs. *Doe*, 54 Fed. 940;
Carson City G. & S. M. Co. vs. *North Star M. Co.* 73 Fed. 597.

VI.

If the Court has any liberty of action in the readjustment of end-line planes the only method for which any judicial precedent can be found is suggested in the Eureka case, i. e., lines drawn at right angles to the course of the vein at the extreme points on the vein within the location. The application of this theory will give all the ore bodies in dispute (and more) to the Argonaut Company.

Finding 17 in the Eureka case was as follows:

> "17th. That the mining ground in dispute is situated "within the lode or ledge as hereinbefore described, and "within planes drawn vertically down through the end- "lines of the plaintiff's patented location of the Cham- "pion claim, and within planes drawn vertically down "through the extreme points of the patented locations "of the At Last and the Lupita or Margaret claims at "right angles to the course or strike of the said lode or "ledge and produced so as to follow the dip of the lode. "The top or apex of said lode is within the surface-lines "of said patents to the plaintiff, and said lode dips at "right angles to its course, and on such dip extends un- "der the surface of the Utah and Arctic claims of de- "fendants."

Evidently the right-angle theory was the subject of discussion in the case. We find Judge Field referring to it in his opinion (4 Sawy., at page 323). Speaking generally of end-lines under local rules, he said:

> "Lines drawn vertically down through the ledge or "lode at right angles with a line representing this gen- "eral course at the ends of the claimant's location will "carve out, so to speak, a section of the ledge or lode "within which he is permitted to work and out of which "he cannot pass."

And in the decision of this Court we find the following statement:

"The particular mining ground in dispute is situated "within the zone of limestone which has been described "and within planes drawn vertically down through the "end-lines of the Champion Company as patented, and "within planes drawn vertically down through the "extreme points of the patented locations of the At Last "and Margaret claims at right angles to the course or "strike of the zone and produced so as to follow its dip."

Richmond vs. *Eureka*, 103 U. S. 839.

We have heretofore shown the difficulty of applying a rectangular theory to any veins except those whose courses were perfectly straight, and have demonstrated how inequalities may arise in cases of composite claims even by following the rectangular theory.

Be that as it may, if we may accept Judge Field's expression as sanctioning a precedent which the courts are at liberty to follow, the application of such a theory to the case at bar will give to defendant in error the ore bodies in dispute, and more. An inspection of figure 10 will demonstrate this.

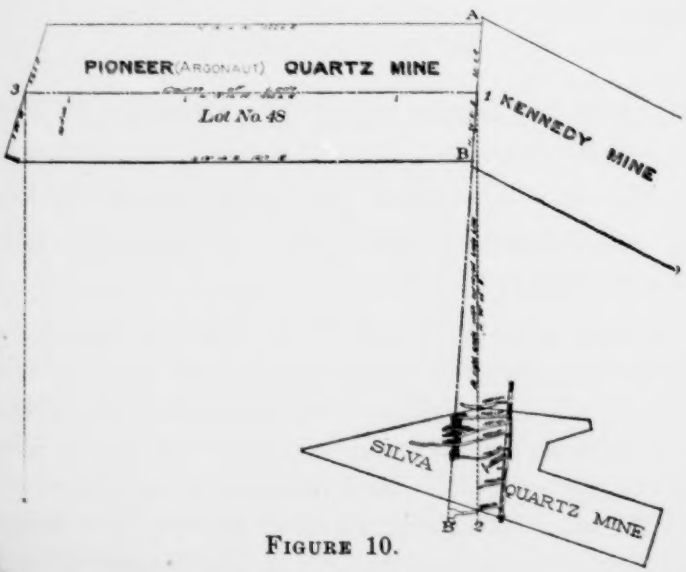

FIGURE 10.

The general course of the vein through the Pioneer ground as fixed by the agreed statement (Par. XXI, Rec. p 29) is N. 19° 14′ W., or N. 19° 14 E′. A course at right angles to this would be N. 70° 45′ E., or S. 70° 45′ W.

Producing these lines on Figure 10 from the extreme points on the vein within the Pioneer location gives us the lines 1—2 and 3—4, as extralateral bounding planes, awarding to the Argonaut a larger segment of the ground invaded by the Kennedy workings than is claimed in this action.

Whatever may be said of the legal value of this method of adjusting inequalities, the original owners of the two properties evidently thought it quite equitable. Their agreement provided for this method of adjusting the conflict between them (Par. VIII, Agreed Statement, Rec. p. 15), but the surveyor, who was the agent of both parties, gave the Kennedy Co. a little the best of it. The Supreme Court of California adopted the rectangular theory here discussed, as will appear from its opinion.

VII.

The Kennedy Mining and Milling Company by reason of its acts and conduct and that of its predecessors in title are estopped from asserting that the Argonaut Mining Company has no extralateral right in the vein in dispute.

It seems to us, in the light of the narrative recited in the agreed statement of facts, that the Kennedy Company should be foreclosed and estopped from asserting any right to the ore body in dispute. There was a common end-line established by the patent surveys. Each patent described this line crossing the lode. No attempt was made for 20 years to deny extralateral rights to the Pioneer. As the Kennedy Company

in its lower workings developed the trend of the ore bodies, finding that they passed out of and beyond the common end-line plane, it made a location necessarily based upon another vein, the surface of such location overlying the dip of the Pioneer vein, and it now insists that by reason of the irregularity of surface form of the Pioneer claim these ore bodies belong by presumption to the Kennedy Company under its Silva location.

Whether or not we may consider the agreement referred to and filed in the patent proceeding as valid and binding on the successors in interest of the two original companies who were parties to it, certainly the present Kennedy Company purchased with the knowledge that this was a common boundary established as such by the patents many years prior to its purchase. As it defined the rights of the two companies in length on the lode, it necessarily included a definition and division of the extralateral right.

When two several mining companies agree upon a boundary line between the two companies and subsequently other parties purchase the several interests of the two companies with a knowledge of the boundary line so fixed, both parties are concluded by it and are estopped from denying the line.

McGee v. *Stone*, 9 Cal. 600.

Of one thing we are quite sure the common boundary A—B crossing the lode was fixed as the result of an adverse proceeding in the Land Office, and the agreement entered into in respect thereto as set forth in the agreed statement of facts. While we do not contend that this agreement could of itself control or modify the patent, we ought to be permitted to invoke the doctrine of estoppel, where the patent as issued under such circumstances practically carried the agreement into effect.

Conclusion.

We think we have fairly covered the field open to discussion. We have not, perhaps, taken occasion to traverse every statement made by counsel for plaintiff in error, or to criticise every case and its application to the questions presented. There is much in their brief which, from our standpoint, is foreign to the problems which confront us. Cases are cited which, in our judgment have no bearing. We have endeavored to confine ourselves to what, with the lights before us, we undrstand to be the pivotal questions involved. We are content to submit the case upon this presentation.

We respectfully submit that either the motion to dismiss should be granted, or that the judgment should be affirmed.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
W. J. McGEE,

Counsel for Defendant in Error.

APPENDIX.

OPINION OF TRIAL COURT.

In the Superior Court

OF THE

County of Calaveras,

STATE OF CALIFORNIA.

ARGONAUT MINING COMPANY (A CORPORATION),

Plaintiff,

vs.

KENNEDY MINING AND MILLING COMPANY (A CORPORATION),

Defendant.

Formerly No. 1408 in the Superior Court of Amador County.

The plaintiff commenced two actions against the defendant in the Superior Court of Amador County, said actions being numbered respectively 1179 and 1408 in the Superior Court of said county. Upon the petition of the defendant the cases were transferred to the Circuit Court of the United States. Motion by plaintiff was subsequently made in the Circuit Court to remand both cases to the Superior Court of Amador County, which motion was granted. (*Argonaut Min. Co.* vs.

Kennedy Min. & Mill Co., 84 Fed. 1.) Upon the cases being remanded to the State Court they were removed to the Superior Court of Calaveras County for trial and determination.

The complaint in each action is in the form of an ordinary declaration in trespass, coupled with a prayer for an injunction. The first action was commenced August 11, 1894, to recover three hundred and twenty-five thousand dollars damages. The second action was commenced August 5, 1897, to recover one hundred and twenty-five thousand dollars damages for trespasses alleged to have been committed since the commencement of the first action.

The two causes were submitted to the Court upon agreed statements of fact and were both argued together. The underlying questions of fact in both cases are identically the same, and the opinion of the Court in one will apply with equal force to the other. There is a slight difference as to the defense in the first action from the defense in the second action, but both cases involve a trespass upon the same vein claimed by the plaintiff, and differ only as to the locality and the time of the alleged trespasses. The arguments of the attorneys were principally directed to the issues involved in the second action, No. 1408, and to those issues the Court will direct its opinion.

The facts of the said cause may be epitomized as follows: Plaintiff and defendant are both corporations organized and existing under and by virtue of the laws of the State of California. The plaintiff is the owner of the mining claim designated on Exhibit "A" as the "Pioneer" Mine, and the defendant is the owner of the mining claim designated on said Exhibit as the "Kennedy Mine;" both of said mining claims are patented. The Kennedy Mining Company (a corporation), the grantor of the defendant, filed its application for

patent for the Kennedy Mine on the 13th day of October, 1870; and the Pioneer Gold and Silver Mining Company (a corporation), the immediate predecessor in title of the plaintiff, filed its application for patent for the Pioneer Mine on the 13th day of January, 1871.

Thereafter, on the 15th day of March, 1871, the Surveyor General of the United States for the State of California issued his instructions to William L. McKim, deputy mineral surveyor, to make survey for patent of said Kennedy Mine, and in pursuance of said instructions said McKim, during the months of April and May, 1871, made and completed such survey, and on the 19th day of October, 1871, the said survey was approved by the Surveyor-General. On the 11th day of November, 1871, the said Kennedy Mining Company entered and paid for said mining claim so surveyed, and on the 29th day of July, 1872, the Government of the United States issued to said Kennedy Mining Company a patent for the said mining claim. On the 28th day of December, 1886, said Kennedy Mining Company conveyed the said mine to the defendant, the Kennedy Mining and Milling Company.

On the 16th day of June, 1871, the United States Surveyor General for the State of California issued his instructions to said William L. McKim to make survey for patent for the Pioneer Quartz Mine, and on the 1st day of September, 1871, said McKim completed the said survey and the Surveyor General approved the same on the 21st day of December, 1871. On the 23d day of February, 1872, the Pioneer Gold and Silver Mining Company entered and paid for said mining claim, and the Receiver of the Land Office thereupon issued his duplicate receipt evidencing such entry and payment; and on the 12th day of August, 1872, the Government of the United States issued to the said Pioneer Gold and Silver Min-

ing Company a patent for the said Pioneer Quartz Mine. The plaintiff, the Argonaut Mining Company, became the owner of said mine by deed, executed July 3, 1893, by the said Pioneer Gold and Silver Mining Company.

The two mining claims are adjoining properties; the line A—B marked on the diagram "Exhibit A" is the northern end-line of the said Pioneer Quartz Mine as patented, to the extent of the length of said line, to-wit: seven (7) chains and sixty (60) links, is coincident with the southern end-line of the Kennedy Mine, as described in the patent of said Kennedy Mine. The course of said line A—B is north seventy-four (74) degrees, fifty-one (51) minutes east. The dotted line B—B' is the line A—B produced indefinitely in its own direction.

The plaintiff has sunk an incline shaft which has its collar or top in the Pioneer Millsite, at a point marked "S" on Exhibit "A," and descends into the earth downward from its collar easterly at an average angle of approximately sixty-two degrees from the plane of the horizon. Traversing said Kennedy and Pioneer Mines in a general northerly and southerly direction is a well-defined vein, varying in width from three inches to thirty feet; said vein dips and descends into the earth easterly at an average angle of approximately forty degrees from the plane of the horizon until it reaches a point in the Argonaut shaft about four hundred and forty feet below the collar thereof, below which point said vein dips and descends into the earth easterly at an average angle of approximately sixty-three degrees from the plane of the horizon. The general direction of the dip of said vein is indicated by the arrows on Exhibit "A." The general course of said vein is S. 19 degrees 14 minutes E. or N. 19 degrees 14 minutes W., as is apparent on the surface by the outcrop visible in

said Pioneer Mine. Said vein in its course southerly passes out of said Kennedy Quartz Mine, crossing the line A—B at a point thereon marked "Z" on Exhibit "A," and enters the Pioneer ground; thence pursuing its general southerly course toward the southern end-line of the Pioneer Quartz Mine, which it crosses.

The defendant within the Kennedy Millsite at the point marked " X " on Exhibit "A" has sunk a shaft, which is vertical or nearly so to the depth of three hundred and sixty-six feet, or thereabouts, at which depth it encounters the vein as it descends from the overlying apex. Thence said shaft is an incline following the vein on its dip to the present depth of approximately two thousand two hundred and fifty feet. From this shaft the defendant has extended levels and drifts southerly on said vein, which are shown in horizontal projections on Exhibit "A" marked 1450, 1550, 1650 and 1750 levels. Some of these levels have been extended on the vein southerly and beyond a vertical plane drawn through the line A—B produced in the direction of B'.

Between the 8th day of October, 1895, and the 12th day of December, 1895, the defendant extracted and converted to its own use two thousand six hundred and four tons of gold-bearing ore from the said vein southerly and beyond said vertical plane, but within the vertical boundaries of the Silva Quartz Mine delineated on Exhibit "A."

The gross value of the said ore so extracted and converted by defendant was the sum of sixty-two thousand two hundred and eighteen 45-100 dollars ($62,218.45). The aggregate cost of mining and milling the said ore was the sum of six thousand one hundred and nineteen 40-100 dollars ($6119.40), which amount plaintiff consents may be deducted from the gross value of the ore as above stated, in the event that the

Court should determine that plaintiff is entitled to recover in this action, leaving the sum of fifty-six thousand and ninety-nine 95-100 dollars ($56,099.95) in gold as the net profit realized by defendant from said ore.

The vein exposed in defendant's underground workings south of the vertical plane drawn through the line A—B produced in the direction of B' is the identical vein which has its top or apex in the Kennedy Quartz Mine and in the Pioneer Quartz Mine, and such vein is continuous from the top or apex in both mines downward to the lowest depths, and said vein at all points below the surface continues on its course in a general southerly direction indefinitely toward the south end-line of the Pioneer Quartz Mine, which it crosses, and the said 2604 tons of ore were extracted by defendant from said vein south of the vertical plane drawn through the line A—B—B'. Said vein is the identical vein mentioned in the Kennedy patent as the Kennedy vein or lode and in the Pioneer patent as the Pioneer vein or lode.

The Silva Quartz Mine delineated on Exhibit "A" as Lot No. 86, lies to the east of the Pioneer and Kennedy Mines. The surface of the said Silva Quartz Mine overlies so much of the dip of the Kennedy and Pioneer vein as may be found between vertical planes drawn downward through the boundaries of the said Silva Quartz Mine. The defendant, the Kennedy Mining and Milling Company, is the owner of the said Silva Quartz Mine by virtue of a quartz mining patent issued to it on the 6th day of February, 1893.

No part of the ore bodies in dispute lie between vertical planes drawn downward through the end-lines of the Kennedy Mine. The defendant, the Kennedy Mining and Milling Company, makes no claim of right or title to the ores in dispute by reason of its ownership of the Kennedy Mine;

but it claims title to the ores in dispute by reason of its ownership of the Silva Quartz Mine. The patent for the Silva Mine is in the usual form of patents for quartz-mining claims, and contains the usual exceptions and reservations. It is presumptively based upon a vein having its apex within the exterior boundaries of the Silva Mine. Like all quartz-mining patents it contains the usual reservation that the premises granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge the top or apex of which lies outside of the boundaries of the granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

The ore bodies in dispute are within the vertical boundaries of the said Silva Quartz Mine, but are a part of the vein having its top or apex within the Pioneer Quartz Mine, which vein on its dip to the east extends under the surface of the Silva Mine.

At common law a grant of land carries with it all beneath the surface of the earth. In the absence of some one having a better right to the vein which on its dip underlies the surface of the Silva Quartz Mine, the defendant would own it. The defendant, the Kennedy Mining and Milling Company, has the right to say, in the language of Judge Hawley:

> " Hands off any and everything within my surface " lines extending vertically downward, until you prove " that you are working upon and following a vein which " has its apex within your surface claim, of which you " are the owner." (*Cons. Wyoming M. Co.* vs. *Champion* " *M. Co.*, 63 Fed. 540.) For " within the lines of each " location the owner shall be regarded as having full " right to all that may be found until some one can show " a clear title to it as a part of some lode or vein having " its top or apex in other territory. In other words, we " may say that there is a presumption of ownership in

" every locator as to the territory covered by his location,
" and within his own lines he shall be regarded as the
" owner of all valuable deposits until some one shall
" show by a preponderance of testimony that such deposit
" belongs to another lode having its top or apex else-
" where."

Leadville Mining Co. vs. *Fitzgerald*, 4 Mor. Min. Rep. 380;

See also, *King* vs. *Amy and Silversmith Min. Co.*, 152 U. S. 222;

Duggan vs. *Davey*, 26 N. W. Rep. 887;

Doe vs. *Waterloo Min. Co.*, 54 Fed. 935;

Chessman vs. *Shreve*, 37 Fed. 36.

A party claiming the right to follow a vein on its dip under the surface of another person's mining claim is required to show by a preponderance of evidence that he has that right by virtue of his ownership of the vein which has its top or apex within his surface claim, and to which is attached under the law an extralateral right.

The end-lines of the Pioneer Quartz Mine as patented are not parallel. The northern end-line diverges substantially toward the north from a direction parallel to the southern end-line; such divergence being to the extent of fourteen (14) degrees and forty-five (45) minutes northerly from a direction parallel to the southern end-line; such divergence between the said end-lines is easterly and in the direction of the dip of the Pioneer vein.

By reason of such non-parallelism of the end-lines of the Pioneer Mine, the defendant claims that no extralateral right is attached to the Pioneer, and that the plaintiff has no right to follow the Pioneer vein beyond the vertical boundaries of the Pioneer Mine.

The controlling question, then, in this case is: Has the plaintiff the right to follow the Pioneer vein on its dip beyond

the vertical plane drawn through the eastern side-line of the Pioneer Mine? This question is a most important one, and the Court has given to it its most careful and earnest consideration.

The patent for the Pioneer Quartz Mine recites that in pursuance of the Act of Congress approved July 26, 1866, entitled "An Act granting the right of way to ditch and canal "owners over the Public Lands, and for other purposes," the Act amendatory thereof, approved July 9, 1870, and the Act approved May 10, 1872, entitled "An Act to promote the "development of the mining resources of the United States," there had been deposited in the General Land Office of the United States the plat and field notes of the survey of the Pioneer Gold and Silver Mining Company upon the Pioneer Quartz Lode bearing gold, accompanied by the certificate of the Register of the Land Office at Sacramento, in the State of California, whereby it appears that in pursuance of said Acts of Congress, the Pioneer Gold and Silver Mining Company did on the 23rd day of February, 1872, enter and pay for said mining claim or premises, being mineral entry No. 63 in the series of said office designated by the Surveyor General as Lot No. 48 in the Jackson Mining District, in Amador County, California, in the district of lands subject to sale at Sacramento, embracing twenty-two and twenty-two hundredths (22.22) acres of land more or less, and which is fully described by metes and bounds.

The following is the granting clause of the patent with the conditions and stipulations annexed:

> " Now, know ye, that the United States of America, in " consideration of the premises and in conformity with " the said Acts of Congress, have given and granted and " by these presents do give and grant unto the said Pio- " neer Gold and Silver Mining Company, and to their " successors and assigns, the said mining premises here-

" inbefore described as Lot number forty-eight (48), " embracing a portion of the northeast quarter of section " twenty (20) in Township six (6) north of range eleven " (11) east, Mt. Diablo Meridian, with the exclusive " right of possession and enjoyment of all the land in- " cluded within the exterior lines of said survey, not " herein expressly excepted from these presents, and of " fifteen hundred and eighty-nine 94-100 linear feet of " the said Pioneer Quartz Vein, lode, ledge or deposit as " hereinbefore described *throughout its entire depth, al-* " *though it may enter the land adjoining*, and of all the " veins, lodes, ledges or deposits throughout their entire " depth, the tops or apexes of which lie inside the exteri- " or boundary lines of said survey at the surface, ex- " tended downward vertically, although such veins, lodes, " ledges or deposits in their downward course may so far " depart from a perpendicular as to extend outside the " vertical side-lines of said survey;

" Provided, that the right of possession hereby granted " to such outside parts of said veins, lodes, ledges or de- " posits shall be confined to such portions thereof as lie " between vertical planes drawn downward through the " end-lines of said survey at the surface so continued in " their own direction that such vertical planes will inter- " sect such exterior parts of said veins, lodes, ledges or " deposits.

"And, provided further, that nothing in this convey- " ance shall authorize the grantees herein, their suc- " cessors or assigns, to enter upon the surface of the min- " ing claim owned or possessed by another.

"To have and to hold said mining premises, together " with all the rights, privileges, immunities and appur- " tenances of whatsoever nature thereunto belonging, " unto the said Pioneer Gold and Silver Mining Com- " pany, and their successors and assigns forever, subject, " nevertheless, to the following conditions and stipula- " tions:

" First. That the grant hereby made is restricted to " the land hereinbefore described as Lot number forty- " eight (48) with fifteen hundred and eighty-nine and " 94-100 linear feet of the Pioneer Quartz Vein, lode, " ledge or deposit throughout its entire depth as afore- " said, together with all other veins, lodes, ledges or de-

" posits throughout their entire depth as aforesaid, the " tops or apexes of which lie inside of the exterior lines " of said survey, and to which no valid adverse claim " existed on the 10th day of May, eighteen hundred and " seventy-two.

" Second. That the premises hereby conveyed, with " the exception or the surface, may be entered by the " proprietor of any other vein, lode, ledge or deposit, " the top or apex of which lies outside of the exterior " limits of said survey, should the same in its downward " course be found to penetrate, intersect, extend into, or " underlie the premises hereby granted, for the purpose " of extracting and removing the ore from such other " vein, lode, ledge or deposit.

" Third. That the premises hereby conveyed shall be " held subject to any vested and accrued water rights for " mining, agricultural, manufacturing or other purposes, " and rights to ditches and reservoirs used in connection " with such water rights as may be recognized and ac- " knowledged by the local laws, customs and decisions of " courts.

" Fourth. That in the absence of necessary legisla- " tion by Congress the Legislature of California may " provide rules for working the mining claim or premises " hereby granted, involving easements, drainage, and " other necessary means to its complete development."

It is argued that the said patent for the Pioneer Quartz Mine in so far as it attempts to grant an extralateral right is absolutely void, as being beyond the jurisdiction of the Land Department of the United States to make such a grant for the reason of the non-parallelism of the end-lines of the Pioneer Quartz Mine.

Numerous authorities are cited to the effect that if the officers of the Land Department acted without authority of law, then their acts are void for want of power to issue the patent. Of the correctness of this proposition there can be no question. The authorities are uniform in holding that a patent issued by the Land Department of the United States to land

over which that Department has no power of disposition is absolutely void and conveys no title whatsoever.

New Dunderberg Min. Co. vs. *Old*, 79 Fed. 598;
Rose vs. *Richmond Min. Co.*, 17 Nev. 25;
Reichart vs. *Felps*, 6 Wall. 160;
Best vs. *Polk*, 18 Wall. 112;
Sherman vs. *Buick*, 3 Otto, 209;
Fancoeur vs. *Newhouse*, 40 Fed. 618;
Smelting Co. vs. *Kemp*, 104 U. S. 641;
Wright vs. *Rosebury*, 121 U. S. 519;
Davis, Adm'r., vs. *Wiebbold*, 139 U. S. 507;
Doolan vs. *Carr*, 135 U. S. 624;
Deffeback vs. *Hawke*, 115 U. S. 392;
Larkin vs. *Dolly*, 53 Fed. 333;
Larkin vs. *Roberts*, 54 Fed. 461.

The plaintiff's title to the Pioneer Quartz Mine was derained under locations made prior to the passage of the Act of May 10, 1872; in other words, its right accrued under the Act of Congress of July 26, 1866. This Act was the first general legislation in respect to the disposal of mines. By the first section of the said Act it is provided :

> "That the mineral lands of the public domain, both "surveyed and unsurveyed, are hereby declared to be "free and open to exploration and occupation by all "citizens of the United States and those who have de- "clared their intention to become citizens, subject to "such regulations as may be prescribed by law, and "subject also to the local customs and rules of miners, in "the several mining districts, so far as the same may not "be in conflict with the laws of the United States."

The second section gave to the claimant of a vein or lode bearing gold, silver, cinnabar or copper, the right to file in the local land office a diagram of the same, so extended lat-

erally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dip, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition. Section 3 set forth the steps necessary to be taken in order to obtain a patent, and provided that such plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued. Section 4 among other things provided:

> "That no location hereafter made shall exceed 200 "feet in length along the vein for each locator, with an "additional claim for discovery to the discoverer of the "lode, with the right to follow such vein to any depth "with all its dips, variations and angles; together with "a reasonable quantity of surface for the convenient "working of the same, as fixed by local rules; and pro- "vided further, that no person may make more than one "location on the same lode, and not more than 3,000 feet "shall be taken in any one claim by any association of "persons."

As before stated the patent for the Pioneer Quartz Mine was issued on the 12th day of August, 1872. But all the steps necessary to obtain a patent under the Act of 1866 were had and taken by plaintiff's grantor, the Pioneer Gold and Silver Mining Company prior to the passage of the Act of Congress of May 10, 1872. By sections 2 and 3 of the Act of July 26, 1866, it was provided that a claimant of a lode or vein could file a diagram of the same so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and enter such tract and receive a patent therefor, granting such mine together with the right to follow such

vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining, which land adjoining shall be sold subject to this condition; that upon the filing of this diagram and the posting of the same together with a notice of intention to apply for a patent, the Register of the Land Office should publish and post the notice for the period of ninety days, and after the expiration of said period if no adverse claim had been filed the Surveyor General should on application of the party survey the premises, make a plat thereof endorsed with his approval, designate the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment of five dollars per acre, together with the costs of survey, plat and notice, and giving satisfactory evidence that the diagram and notice had been posted for the period of ninety days, the Register should transmit to the General Land Office the plat, survey and description and a patent should issue for the same thereupon.

All of this had been done by the Pioneer Gold and Silver Mining Company long before the Act of May 10, 1872, was passed. On the 23rd day of February, 1872, the claimant of the Pioneer Mine entered and paid for the said mining claim, and the Receiver of the Land Office on said day issued his duplicate receipt evidencing such entry and payment. As soon as this payment was made the Pioneer Gold and Silver Mining Company was entitled to a patent. When the Act of May 10, 1872, was, passed, plaintiff's grantor held the obligation of the Government to issue to it a patent for the Pioneer Mine under the Act of July 26, 1866.

> " By the mining laws of the United States three dis-
> " tinct classes of title are created, viz: 1—Title in fee
> " simple; 2—Title by possession; 3—The complete
> " equitable title. The first vests in the grantee of the

"Government an indefeasible title, while the second "vests a title in the nature of an easement only. The "first being an absolute grant by purchase and patent "without condition, is not defeasible, while the second, "being a mere right of possession and enjoyment of "profits without purchase and upon condition may be "defeated at any time by the failure of the party in pos- "session to comply with the condition, viz: To perform "the labor or make the annual improvements required "by the statute. The equitable title accrues immediately "upon purchase, for the entry entitles the purchaser to a "patent, and the right to a patent once vested is equiv- "alent to a patent issued."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 428.

"When the price is paid the right to a patent immedi- "ately arises. If not issued at once it is because the "magnitude of the business of the Land Department "causes delay. But such delay, in the mere administra- "tion of affairs, does not diminish the rights flowing from "the purchase, or cast any additional burdens on the "purchaser, or expose him to the assaults of third persons."

Benson Mining Co. vs. *Alta Mining Co.*, 145 U. S. 431, 432.

In the case of *Stark* vs. *Starr*, 6 Wall. 402, the United States Supreme Court held:

"The right to a patent once vested is treated by the "Government, when dealing with the public lands, as "equivalent to a patent issued. When, in fact, the pat- "ent does issue it relates back to the inception of the "right of the patentee, so far as may be necessary to cut "off intervening claimants."

Carroll vs. *Safford*, 3 How. 441, it is said that—

"Lands which have been sold by the United States "can in no sense be called the property of the United "States. They are no more the property of the United "States than lands patented. So far as the rights of "the purchaser are considered, they are protected under "the patent certificate as fully as under the patent. * * "When sold, the Government, until the patent shall "issue, holds the mere legal title for the land in trust for "the purchaser."

In *Con. Wyoming Gold Min. Co.* vs. *Champion Min. Co.*, 63 Fed. 540, and in *Walrath* vs. *Champion Min. Co.*, 63 Id. 552, it is held by Judge Hawley that "a receipt and certificate of "purchase from the United States Land Office is the equiva- "lent of a patent," and to the same effect is the decision of the United States Supreme Court in *Deffeback* vs. *Hawke*, 115 U. S. 392.

In *People* vs. *Shearer*, 30 Cal. 645, 648, the Court, speaking through Mr. Justice Sawyer, said:

> "By the payment and acceptance of the purchase "money the claimant has performed everything to be done "by him, and the purchase has been completed. The pay- "ment, receipt of the purchase money, and the issuing "of a receipt and certificate of entry therefor, constitute "an entry of the land. The contract of purchase is ex- "ecuted and the land is his, and no longer belongs to the "Government. The conveyance has not been made, but "the Government of the United States only holds the "legal title in trust for the purchaser. The land no "longer constitutes a part of the public domain. The "United States have ceased to have any proprietary in- "terest in it. It is henceforth private property. * *."

When a party pays the purchase money and receives the certificate of sale, he is the owner of the land.

> "The United States has ceased to have any pecuniary "interest in it. They hold the naked, dry, legal title "for the holder of the certificate."
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> *Hamilton* vs. *Southern Nevada Mining Co.*, 13 Sawy. 113, 33 Fed. 562;
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> *Union M. Co.* vs. *Danberg*, 2 Sawy, 455;
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> *Amador Medean Gold M. Co.* vs. *South Spring Gold Min. Co.*, 13 Sawy. 523, 36 Fed. 668, 670;
>
> *Aurora Hill Cons. Min. Co.* vs. *85 Min. Co.*, 12 Sawy. 355, 34 Fed. 515.

In *Wirth* vs. *Branson*, 98 U. S. 118, Justice Bradley, who delivered the opinion of the Court, speaking of the value, force, and effect of the proceedings anterior to the issuance of a patent, says:

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof. * * * The public faith has been pledged to him. * * *"

The authorities are uniform in holding that when a person pays the Government the purchase price of the land and receives the certificate of purchase, he is then vested with the complete equitable title, and the mere dry, naked, legal title remains in the Government in trust for the holder of the equitable title, in whom is vested all the rights and obligations of ownership.

In *Benson Min. Co.* vs. *Alta Min. Co.*, 145 U. S. 428, Mr. Justice Brewer, speaking for the United States Supreme Court, uses the following language at page 434:

"There is no conflict in the rulings of this Court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and no third party can acquire from the Government interests as against him."

By the foregoing authorities it is abundantly established that when, on the 23d day of February, 1872, the purchase price was paid and the certificate of purchase issued, the Pioneer Gold and Silver Mining Company was invested with the complete equitable title and held the obligation of the Government to issue to it a patent for the Pioneer Mine. A patent, when granted, relates back to the first valid initial step, which is the foundation of the right, and in pursuance of which the patent is issued.

Kahn vs. *The Old Telegraph Min. Co.*, 2 Utah, 174, 11 Mor. Min. Rep. 645;
Benson Min. Co. vs. *Alta Min. Co.*, 145 U. S. 428, 434;
Stark vs. *Starr*, 6 Wall. 402;
Ely vs. *Frisbie*, 17 Cal. 250;
Yount vs. *Howell*, 14 Cal. 465;
Touchard vs. *Crow*, 20 Cal. 150;
Aurora Hill Co. vs. *85 Min. Co.*, 12 Sawy. 355, 34 Fed. 515;
Eureka Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302.

As the plaintiff's grantor received its certificate of purchase prior to the passage of the Act of May 10, 1872, and the patent which was subsequently issued related back to the inception of the rights of the patentee, it is clear to my mind that the extralateral rights of the plaintiff must be determined under the Act of July 26, 1866. When the Act of May 10, 1872, was passed, the plaintiff's grantor was already the owner of the absolute equitable title to the Pioneer Quartz Mine, and had been such owner ever since the 23rd day of February, 1872, the day on which it paid the Government of the United States the purchase price of the land. The fact that the patent was not issued until the 12th day of August, 1872, is, in my judgment, wholly immaterial. If, on account of the magnitude of the business in the Land Department, the patent was not issued immediately after the payment, such delay will not cast additional burdens upon the purchaser, nor deprive him of any right which he otherwise would have had. If by the Act of July 26, 1866, parallelism of end-lines was not required, then my opinion is that the plaintiff is entitled to extralateral rights irrespective of the provision of the Act of May 10, 1872, which makes parallelism in end-lines an essential requisite to the existence of any right in the locator or patentee to follow his vein on its dip outside of the vertical planes drawn through the side-lines.

As before stated the Act of July 26, 1866, was the first general legislation looking to the disposal of mines. Before its passage the rights of miners upon the public domain of the United States were governed by the local rules and customs of miners. The act did not interfere with those rights, but was confirmatory thereof. (*Walrath* vs. *Champion Min. Co.*, 63 Fed. 540; *Carson City G. & S. Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658; *Eureka Cons. Min. Co.* vs. *Richmond Min. Co.*, 3 Sawy. 302.) In no provision of the said act is there any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent, and the general purpose of the act was to give the sanction of the Government to those possessory rights, acquired under the local customs, laws, and decisions of the courts. (*Jennison* vs. *Kirk*, 98 U. S. 453.) Under these rules the lode was the principal thing, and the surface ground was a mere incident to the same for the convenient working thereof. (*Walrath* vs. *Champion Min. Co.*, 63 Fed. 540; *Golden Fleece G. & S. Min. Co.* vs. *Cable G. & S. M. Co.*, 12 Nev. 312; 1 Mor. Min. Rep. 120.) The location was made for a certain number of feet of the lode, and the locator was entitled to the number of feet claimed in whatever direction the lode was found with its dips, spurs, and angles. (*Carson City G. & S. Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658.) By the Act of 1866 the claimant of a lode who had occupied and improved the same according to these local rules and customs of miners, and having expended in actual labor and improvement thereon an amount of not less than one thousand dollars, and in regard to whose possession there was no controversy or opposing claim, could receive a patent for the same from the Government of the United States. A

party applying for a patent under said act was required to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract to receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, etc. Under the terms of the Act of July 26, 1866,

> " However tortuous might be the course of the lode, " the claimant had a perfect right to follow it up and " prepare his diagram so as to include it, together with " the surface ground on each side thereof allowed by " local laws. There is no language in the act that " requires the diagram to be in form of a parallelogram " or in any other particular form."

Wolfley et al. vs. *Lebanon Min. Co.*, 4 Colorado, 112; 13 Mor. Min. Rep. 285;

Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 83 Fed. 658, 669.

> "As might be expected, the patents issued under this " statute described surface areas very different and some- " times irregular in form. Often they were like a broom, " there being around the discovery shaft an amount of " ground deemed large enough for the convenient work- " ing of the mine, and a narrow strip extending there- " from as the handle of a broom. This strip might be " straight or in a curved or irregular line, following, as " was supposed, the course of the vein. Sometimes the " surface claimed and patented was a tract of consider- " able size, so claimed with the view of including the " apex of the vein, in whatever direction subsequent ex- " plorations might show it to run. And again, where " there were local rules giving to the discoverer of a mine " possessory rights in a certain area of surface, the patent " followed those rules and conveyed a similar area."

Del Monte Min. Co. vs. *Last Chance Min. Co.*, 171 U. S. 55, 64.

There is no provision of said Act that requires the end-lines of a mining claim to be parallel, nor is there any intention manifested to make parallelism essential. Up to the passage of the Act of May 10, 1872, there was nothing whatever in the statute which called upon the locator to make his end-lines parallel, and it is only by virtue of the Act of May 10, 1872, that parallelism was made essential. The local rules and customs of the miners before the passage of that Act did not require it, nor did the Act of Congress of July 26, 1866. It is said by Mr. Justice Brewer in *Del Monte Mining Co.* vs. *Last Chance Min. Co.* (171 U. S. 67) that "there is no in-"herent necessity that the end-lines of a mining claim should "be parallel." They must be parallel because the statute so specifically provides (Section 2320, Revised Statutes.) Parallelism of end-lines is purely a requirement of the Act of 1872. The object of the statute in this respect was no doubt to prevent a party from claiming more outside his lines than within them (*Doe* vs. *Sanger*, 83 Cal. 203.) This was one of the evils the Act of 1872 provided against. But a right previously acquired was not interfered with by the Act of May 10, 1872. Section 9 of said Act is as follows:

"That sections one, two, three, four and six of an 'Act "'granting the right of way to ditch and canal owners "'over the public lands and for other purposes,' ap-"proved July 26, 1886, are hereby repealed, *but such "repeal shall not affect existing rights.* Applications for "patents for mining claims now pending may be prose-"cuted to a final decision in the General Land Office; "but in such cases, where adverse rights are not affected "thereby, patents may issue in pursuance of the provis-"sions of this Act; and all patents for mining claims "heretofore issued under the Act of July 26, 1866, shall "convey all the rights and privileges conferred by this "Act, where no adverse rights exist at the time of the "passage of this Act."

(Section 2328 *Revised Statutes.*)

The intent of Congress is expressly declared by said section, to preserve unaffected all existing rights acquired under the Act of 1866. Congress, instead of designing to interfere with the previously acquired rights, expressly enlarges them, as are the rights of all prior patentees under the Act of 1866; by granting all veins, lodes and ledges having their tops or apexes within the exterior boundaries of their surface claims. Thus a patent under the Act of 1866 conveyed only the one vein or lode applied for; all other veins were expressly reserved. This said Act provided that the

> " plat, survey, or description shall in no case cover more
> " than one vein or lode, and no patent shall issue for
> " more than one vein or lode, which shall be expressed
> " in the patent issued."
>
> (Section 3, *Act of 1866.*)

The effect of the Act of 1872 (where no adverse rights existed) was to grant to such prior patentees all other

> " veins, lodes and ledges throughout their entire depth,
> " the top or apex of which lies inside of such surface
> " lines extended downward vertically in whatever course
> " or direction they might run."
>
> *Walrath* vs. *Champion Min. Co.*, 63 Fed. 552, 557.

That the intent of Congress was not to abridge any of the rights of the miners acquired under the Act of 1886 is further manifested by Section 12 of the Act of 1872, wherein the following language is used:

> " Nothing in this Act shall be construed to enlarge or
> " affect the rights of either party in regard to any prop-
> " erty in controversy at the time of the passage of this
> " Act, or of the Act entitled 'An Act granting the
> " 'right of way to ditch and canal owners over the pub-
> " 'lic lands, and for other purposes,' approved July 26,
> " 1866, *nor shall this Act affect any right acquired under*
> " *said Act.*"

And Section 16 provides:

> "That all Acts and parts of Acts inconsistent here-
> "with are hereby repealed: *provided, that nothing con-*
> "*tained in this Act shall be construed to impair in any*
> "*way, rights or interests in mining property acquired un-*
> "*der existing laws.*"

The proviso contained in said Section 16 is embodied in the same terms in Section 2344 of the Revised Statutes of the United States.

That the policy of Congress was to preserve previously acquired rights and not to impair them, sufficiently appears by Section 5597 of the Revised Statutes, which section reads as follows:

> "The repeal of the several Acts embraced in said re-
> "vision *shall not affect any act done or any right accruing*
> "*or accrued*, or any suit or proceeding had or commenced
> "in any civil cause before the said repeal, *but all rights*
> "and liabilities under said Acts *shall continue and may*
> "*be enforced in the same manner as if said repeal had not*
> "*been made.* * * *"

It is apparent to my mind from the foregoing provisions of the Statute that the intention of Congress was not to abridge but to preserve and continue the rights of the miners acquired under the provisions of the Act of July 26, 1866.

The Act of May 10, 1872, did not curtail and was not intended to curtail or modify any rights acquired under the Act of 1866. None of its provisions are capable of that construction, nor could the Court so construe the Act as to give it a retrospective effect and thereby impair vested rights. Of course, such being the case, the extralateral rights of the plaintiff must be determined under the provisions of the Act of 1866.

As before stated there is no provision of the Act of 1866 that requires the end-lines of a mining claim to be parallel,

nor is there any intention manifested by said Act to make parallelism essential. That the Act of 1866 (under the provisions of which plaintiff's rights accrued) did not require parallelism of end-lines has been adjudged in the following cases:

Eureka Cons. Min. Co. vs. *Richmond Min. Co.*, 4 Sawy. 302;
Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 83 Fed. 659, 669;
Walrath vs. *Champion Min. Co.*, 63 Fed. 552;
Cons. Wyoming Gold Min. Co. vs. *Champion Min. Co.*, 63 Fed. 540;
Iron Silver Min. Co. vs. *Elgin Min. Co.*, 118 U. S. 196;
Carson City G. & S. Min. Co. vs. *North Star Min. Co.*, 73 Fed. 597.

Upon the question of parallelism of end-lines under the Act of 1866 the case of *Eureka Cons. Min. Co.* vs. *Richmond Min. Co.* (4 Sawy. 302) is important. The plaintiff, the Eureka Mining Company, was the owner of several locations, among which were the Champion, At Last and the Lupita or Margaret Mining Claims. The Champion was patented with parallel end-lines. But the end-lines of the At Last and the Lupita or Margaret as patented were not parallel, *but diverged in the direction of the dip of the vein.* The Champion was located in May, 1870, and was patented in 1872. It did not appear in the record when the At Last and the Lupita or Margaret claims were located. The patent shows that the Lupita was entered and paid for on the 14th of February, 1877, and the patent issued on the 30th day of March, 1877. The At Last, as appears by the patent, was entered and paid for on the 29th day of March, 1873, and the patent issued on the 12th day of December, 1876. The defendant, the Richmond Mining Company, made objection to the validity of the patents to the At Last and the Lupita or Margaret, because the end-lines were not parallel, as required by the provisions

of the Act of 1872. To this contention of the Richmond Company Mr. Justice Field said:

> "But to this objection there are several obvious answers. In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the Acts of 1866, where such parallelism in the end-lines of the surface locations were not required. The presumption of law is that the officers of the Executive Department specially charged with the supervision of applications for mining patents and the issue of such patents did their duty; and in an action of ejectment mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. In the second place the provision of the Statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end-lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the Government has the right to complain."

Unquestionably the above doctrine of the Eureka case, in so far as it holds that the provision of the Statute of 1872 requiring the end-lines of mining claims to be parallel, is merely directory and that no consequence is attached to a deviation from its direction, has been modified by the United States Supreme Court.

Iron Silver Mining Co. vs. *Elgin Min. Co.*, 118 U. S. 196;
Del Monte Min. Co. vs. *Last Chance Min. Co.*, 171 U. S. 55.

The defendant, the Richmond Mining Company, also held several patents issued to it upon different locations, but it specially relied upon the patents to the Richmond and the Tip Top claims. It alleged that these patents were issued upon locations made prior to any upon which the patents to the Eureka Company were issued; and its contention was that inasmuch as the croppings of the vein were within the surface of the patented locations it had the right to follow the vein wherever it went, although it be outside of the end-line planes. Its position was that "whenever under the law of 1866 a "location was made on a ledge or vein, a right was acquired "to follow the vein wherever it might lead, without regard to "the end-lines of the location." In the discussion of this contention of the Richmond Company, Mr. Justice Field, among other things, said:

> "Now, as neither the rules of miners in Eureka Min- "ing District, nor the Act of 1866, in terms speak of "end-lines to locations made on ledges, nor in terms "impose any limitation upon miners following these "veins wherever they may lead, it is contended that no "such limitation can be considered as having existed and "be enforced against the defendant. The Act of 1866, "it is said, recognizes the right of the locator to follow "his vein outside of any end-lines drawn vertically down "when it permits him to obtain a patent granting his "mine, 'together with the right to follow such vein or "'lode, with its dips, angles, and variations, to any depth, "'although it may enter the land adjoining, which land "'shall be sold subject to this condition.'"
>
> "It is true that end-lines are not in terms named in "the rules of the miners, but they are necessarily "implied, and no reasonable construction can be given "to them without such implication. What the miners "meant by allowing a certain number of feet on a ledge "was that each locator might follow his vein for that "distance on the course of the ledge, and to any depth "within that distance. So much of the ledge he was

"permitted as lay within vertical planes drawn down "through the end-lines of his location, and could be "measured anywhere by the feet on the surface. If this "were not so, he might, by the bend of his vein, hold "under the surface along the course of the ledge double "and treble the amount he could take on the surface. "Indeed, instead of being limited by the number of feet "prescribed by the rules, he might, in some cases, oust "all his neighbors and take the whole ledge. No con- "struction is permissible which would substantially defeat "the limitation of quantity on a ledge, which was the "most important provision in the whole system of rules."

The Court is here speaking of the claim of the Richmond Company, under the Act of 1866, to follow its vein wherever it might lead, without regard to the end-lines of the location. In the consideration of the Eureka case the fact must not be lost sight of that the Court is here dealing with patented locations. Whatever may have been the rights of a locator under the Act of 1866, to follow his vein or lode wherever it might lead, still when he received a patent, those rights were controlled by the patented lines, and he could not follow the vein on its course beyond those lines. The contention of the Richmond Company was that it had the right to follow the vein on its strike beyond the end-lines, and this Mr. Justice Field held could not be done, because if this were so, a party "might, by *the bend of his vein*, hold under the surface, along "the course of the ledge double and treble the amount he "could take on the surface." This does not mean the dip of the vein, but it means a bend on its strike, a change in its course, where it may pass out of and beyond the surface location. The decision in the Eureka case gives to the plaintiff all the ground in dispute lying within planes drawn vertically downward through the end-lines of the plaintiff's patented locations. The end-lines of the At Last and the Lupita or Margaret claims, as before stated, were not par-

allel, *but diverged in the direction of the dip of the vein;* and to hold that the language above quoted from the Eureka case requires parallelism of end-lines under the Act of 1866, to support the extralateral right would be to ignore the ultimate conclusion reached by the Court. Therefore this language of Mr. Justice Field must be applied exclusively to the contention of the Richmond Company to follow the vein on its strike beyond the end-line planes. This doctrine of the Eureka case against the right claimed by the Richmond Company to follow the vein beyond the end-line planes is but the forerunner of the following decisions that subsequently defined the rule that you could not follow the vein on its strike beyond your surface boundaries.

Mining Co. vs. *Tarbet*, 98 U. S. 463;
Argentine Min. Co. vs. *Terrible Min. Co.*, 122 U. S. 478;
King vs. *Amy and Silversmith Min. Co.*, 152 U. S. 222;
Iron Silver Min. Co. vs. *Elgin Min. Co.*, 118 U. S. 196.

See, also—

Wolfley vs. *Lebanon Min. Co.*, 4 Colo. 112, 13 Mor. Min. Rep. 282;
New Dunderberg Min. Co. vs. *Old*, 79 Fed. 598;

It is contended by the defendant in the case at bar that the Eureka case was substantially decided upon the ownership by the Eureka Company of the Champion claim alone; a mining claim which had parallel end-lines. With this contention of the defendant I am unable to agree. It is true that the Champion had parallel end-lines, but the decision of the Court was not based on the ground of the ownership by the Eureka Company of the Champion alone, but was based on the ground of its ownership of the Champion, the At Last and the Lupita or Margaret claims.

The Eureka Company was the patentee of several locations, but for the purposes of the action, Mr. Justice Field said, it

was only necessary to refer to three of them—the Champion, the At Last and the Lupita or Margaret claims. The diagram accompanying the opinion (4 Sawy. 304) shows the relative positions of these three mining properties. The Court found that the *top or apex of the lode was within the surface-lines of these mining claims* (Finding of Fact No. 17.) And as the ground in dispute was within planes drawn vertically downward through the end-lines of those patented locations Justice Field held that the ground was the property of the Eureka Company, and that it was entitled to judgment for its possession.

The Eureka case went to the Supreme Court of the United States, and the judgment in favor of the Eureka Mining Company was affirmed. The Supreme Court, after passing upon the compromise agreement, said:

> "The Richmond Company is in no condition to dis-
> " pute the validity of the Eureka's patents for the At
> " Last and the Margaret because the end-lines of the
> " surveys are not parallel, as it has agreed with the Eu-
> " reka, for a consideration, not to work in the limestone
> " to the south and east of the compromise line. Upon
> " the face of the patents the United States has granted to
> " the Eureka the right to all veins, lodes and deposits,
> " the tops or apexes of which lie on the inside of its sur-
> " veys as patented, throughout their entire depth, and
> " wherever they may go, provided it keeps itself within
> " the end-lines of the surveys. The finding that the
> " ground in dispute is within the end-lines and that the
> " apex is within the surface-lines, settled the rights of
> " the parties between themselves as well under their pat-
> " ents as under their compromise agreement."
>
> *Richmond Min. Co.* vs. *Eureka Min. Co.*, 103 U. S. 839, 847.

There is nothing in *Mining Co.* vs. *Tarbet*, 98 U. S. 463, as I read the decision, that requires parallelism of end-lines under the Act of 1866, nor does the decision, as I understand it,

qualify the doctrine of the Eureka case (4 Sawy. 302.) In *Mining Co.* vs. *Tarbet*, commonly called the "Flagstaff case," a surface location was made which was one hundred feet wide by twenty-six hundred feet long. This location was known as the Flagstaff Mine, and for which the plaintiff in error held a patent issued under the Act of 1866. It lay across the lode, not along it. The location was made on the supposition that it followed the course of the ledge, but subsequent developments showed that it crossed the vein at right angles, so that there was but one hundred feet of the vein within the surface boundaries.

The claim of the plaintiff in error was of the ownership of 2,600 feet in length of such vein. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. This contention of the owner of the Flagstaff was presented in the following instruction propounded by the plaintiff in error in the trial court, which instruction the Court refused:

> "By the Act of Congress of July 26, 1866, under "which all these locations are claimed to have been "made, it was the vein or lode or mineral that was "located and claimed; the lode was the principal thing "and the surface area was a mere incident for the con- "venient working of the lode; the patent granted the "lode as such irrespective of the surface area which an "applicant was not bound to claim; it was his conven- "ience for working the lode that controlled his location "for his surface area; and the patentee under that Act "takes a fee-simple title to the lode to the full extent "located and claimed under said Act."

The Supreme Court of the United States in affirming the judgment of the lower court held that in such case the so-called side-lines were in fact end-lines and that the locator was restricted to so much of the lode as his claim covers.

That the right to follow the dip outside of the side-lines was based on the hypothesis that the direction of those lines corresponded substantially with the course of the lode or vein at its apex on or near the surface. "It was not the intent of "the law to allow a person to make his location crosswise of a "vein so that the side-lines shall cross it and thereby give "him the right to follow the strike of the vein outside of his "side-lines. That would subvert the whole system sought to "be established by the law." If he locates crosswise of the lode and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. The end-lines of a location are those which are laid crosswise of the general course of the vein on the surface, and by those lines the locator's rights must be measured, no matter how he may have located his claim.

The question of parallelism of end-lines under the Act of 1866 was not a question before the Court in the Flagstaff case; nor does the Court in any manner pass upon it.

The case of *New Dunderberg Min. Co.* vs. *Old*, 79 Fed. 598, affirms the rule laid down in the Flagstaff case to the effect that when the side-lines of a location cross the course or strike of the vein they constitute end-lines, and the owner of the claim cannot follow the vein outside of those lines. Other questions were also raised and decided, but none of them have any bearing on the question of parallelism of end-lines under the Act of 1866.

The case of *Carson City Gold and Silver Min. Co.* vs. *North Star Min. Co.*, 83 Fed. 658, in many of its features resembles the case at bar; except that the end-lines of the North Star Mine converge, whereas the end-lines of the Pioneer Mine diverge in the direction of the dip of the vein. But the principle in both cases in my judgment is the same.

The application to enter and receive a patent for the North Star Mine was made on the 15th day of September, 1869, and the patent was issued on the 11th day of August, 1875. In the North Star case it was contended for the plaintiff in error that because the patented claim of defendant was composed of a number of locations, no extralateral rights were secured to it unless it showed the lines of each separate location. That Section 2322 Rev. Stat. U. S. refers exclusively to a single location. That if the boundaries comprising the aggregate amount applied for and patented do not appear in the patent, but only the exterior boundaries of the entire aggregated tract, then the patentee, if he claims the extralateral right as to any vein, the apex of which is found within the surface of his aggregate tract, should be held to establish by proof where some location was, and how it was laid upon the ground, or be denied the extralateral right.

The Court held that this contention could not be sustained. "That the defendant was not required to show the separate "lines of any of the original locations embraced within the "surface boundaries of the patented claim." It was enough for it to show that a lode running in an easterly and westerly direction (lengthwise with the claim) and having its apex within the surface boundaries of the defendant's patented ground, extended in its dip downward into plaintiff's ground.

The Court then discusses the rights conveyed by a patent and the presumptions in favor of patents regularly issued, citing authorities to the effect that the issuance of the patent is conclusive as to all precedent acts and facts which the Land Department must find to exist before the patent can rightfully issue.

As to the end-lines of the North Star Claim not being parallel, the Court, speaking through Judge Hawley, said:

"The plaintiff in error contends that if the patented "area of the North Star is to be considered as a location " its end-lines are not parallel, as found by the Court, and " that under Section 2310 Rev. Stat. the defendant pos- " sesses no extralateral rights under it. The Act of 1866, " under the provisions of which the patent in this case " was applied for, and under which rights of defendant " in error accrued, did not require parallelism of end- " lines."

From the foregoing it follows that the plaintiff possesses extral eral rights, and is entitled under its patent to follow the Pio er vein on its dip beyond the vertical plane drawn through the eastern side-line of the Pioneer Mine.

As to the question of interest, my opinion is that under Section 3287 of the Civil Code the plaintiff is only entitled to recover interest from the date of the stipulation.

I have examined the numerous cases cited with care, and after a most careful consideration of this case my conclusion is that plaintiff, the Argonaut Mining Company, is the owner of the ore bodies in dispute and that it is entitled to judgment. And it will be so ordered.

Dated March 13, 1889.

G. W. NICOL,
Judge Presiding.

[Endorsed]: Filed March 15, 1889, by J. S. Jack, Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

Nos. 49 and 58.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ORAL ARGUMENT OF MR. CURTIS H. LINDLEY FOR DEFENDANT IN ERROR.

(18,060 & 18,080.)

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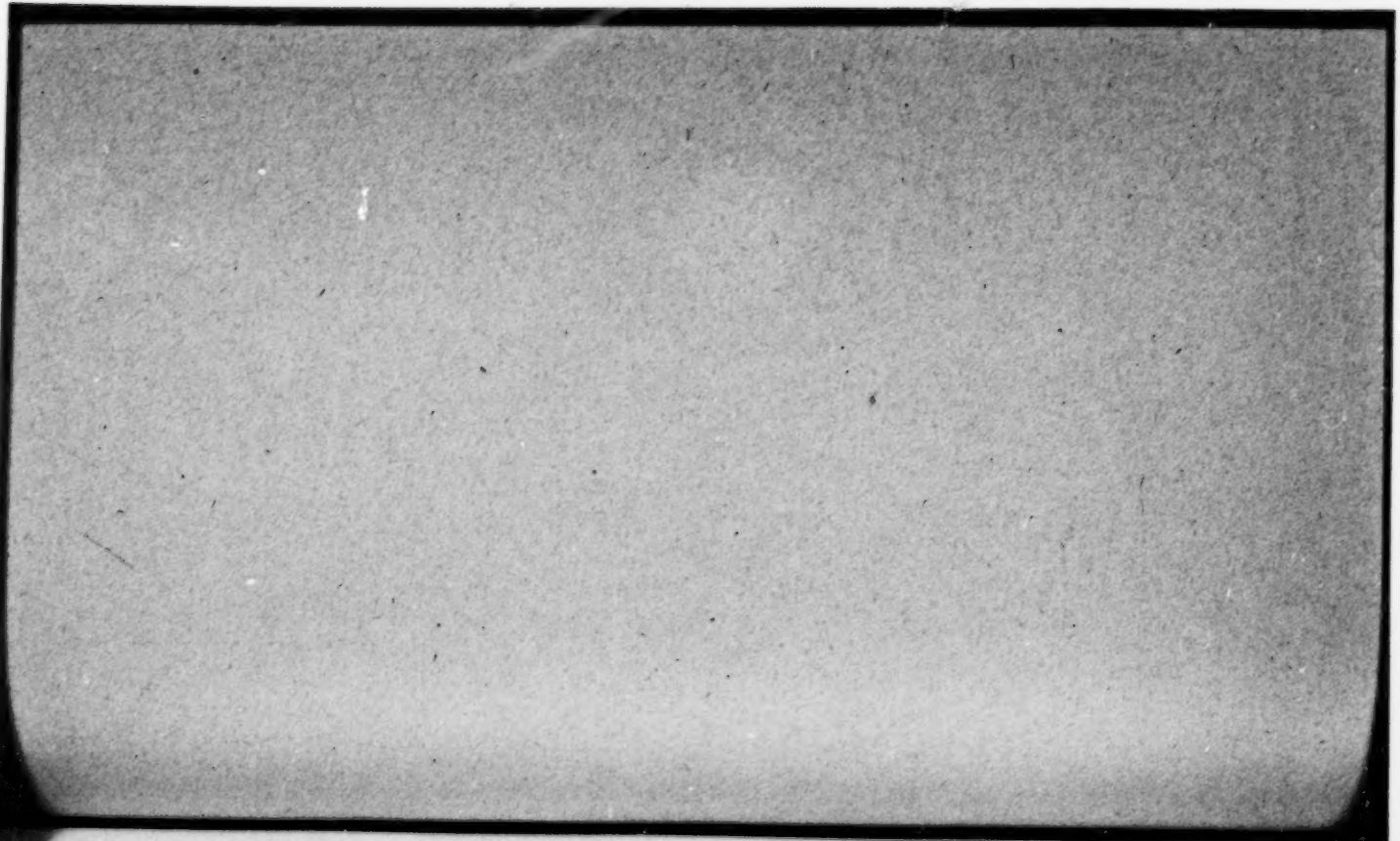

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 49.

THE KENNEDY MINING AND MILLING COMPANY,
PLAINTIFF IN ERROR,

v.

THE ARGONAUT MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Argument of Mr. Curtis H. Lindley for Defendant in Error.

Mr. LINDLEY: If your honors please, before taking up the merits of the controversy, with your permission I will address myself to the jurisdictional question.

We have here presented a controversy between two claimants, one asserting an extralateral right on a lode to follow the vein upon its downward course underneath the surface of an adjoining claim; the other, the owner of such adjoining claim, defendant in error, as the owner of the Pioneer, maintains that the lode has its origin within the Pioneer

ground and on its downward course passes underneath the Silva, the property of plaintiff in error. The priorities are by twenty years in favor of the Pioneer. The Pioneer contains the top or apex of the vein. The Silva does not. The point from which the ore in controversy was extracted was vertically underneath the surface of the Silva claim.

The action was trespass to recover damages for the ore extracted from the Pioneer vein underneath the surface of the Silva. Title to the Pioneer was set up in the complaint; ownership of the surface by the Pioneer was admitted by the pleadings, but our right to follow the vein in its downward course was denied.

No claim was set up in the answer to the ownership of the ore bodies in dispute. It was a simple denial of the underground rights of the Pioneer.

Now, let us see the manner in which this so-called Federal question was raised in the court below. Let us apply a method of common factoring and sift it down to the crucial question in the case. The manner in which counsel for plaintiff in error raised this question is found in the record. Please bear in mind the fact that the patent of the Silva contains a reservation, which is in the following language:

Mr. Justice PECKHAM: Where do you read from?

Mr. LINDLEY: I am about to read from page 6 of my brief on motion to dismiss or affirm. The Silva patent is found on page 31 of the printed record, and the clause to which I have reference is found on page 33 of the printed record. The language of that reservation is as follows:

"First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of

any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

It should also be borne in mind that under the act of 1872, as well as under the act of 1866, locations were made upon the outcrop of what the act of 1872 calls the top or apex of the vein. The Silva quartz mine, with its location in its present form, could not acquire any right on the Pioneer vein, because it did not have within its exterior boundaries the top or apex of the vein. The discovery on the dip of the vein, as was held by this court in Upton *v.* Larkin, would not have been a valid discovery. The law contemplates location by discovery of apex within the exterior boundaries of the claim.

That being the situation as to the facts, let us see the manner in which the Federal question is raised, and the construction of the act of Congress that counsel contends for to sustain his rights to this lode, which construction is controverted. In order to raise a Federal question, as I understand, the rule of this court is that there must be some *controverted* construction calculated to deprive a party of a substantial right guaranteed or granted to him by an act of Congress. Now, the Federal question was raised by the plaintiff in error at the end of a series of twenty-three objections to the admission of testimony, and it was raised in this manner——

Mr. Justice PECKHAM: Suppose you refer to that portion of the record.

Mr. LINDLEY: Yes, I will. It is page 54 of the record:

"And this defendant specially sets up and claims that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by the plaintiff to the ores in question by reason of its ownership of the Pioneer quartz mine, lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva quartz mine, lot No. 86, is involved, first, the construction of the act of the Congress of the United States approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States,' under the provisions of which plaintiff acquired its title to said lot No. 48, and, second, the construction of chapter 6 of title 32 of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said lot No. 86."

No indication upon the face of the statement as to what construction is contended for, or as to what controversy there was over the construction. In fact there was no controversy over the construction of the act. It is not by reason of anything within the Silva patent or anything that purports to be conveyed by the Silva patent by which the plaintiff in error is deprived of something by any construction of the act of 1872. It is simply an inquiry as to the extent of the thing conveyed, and in order to determine what is within the reservation you are compelled to go entirely outside of the Silva patent, and when you do that you certainly go beyond the Federal question that is asserted or suggested with reference to the patent itself.

Mr. Justice McKenna: Where do you contend we go to?

Mr. Lindley: You go to a lode having its apex outside,

and determine whether it passes under the surface. It raises a mixed question of law and fact, and I shall quote authorities in a few moments.

The mere assertion of a right to property under any of the public land laws does not necessarily involve the construction of an act of Congress. If such were the case, as has been said by this court in Rutter *v.* Shoshone Mining Co. (177 U. S., 505, 507), every action to establish title to real estate in the newer States would involve a Federal question, because the title arises out of a patent issued by the Government pursuant to acts of Congress. In that case, I may remark, all these questions with reference to the "Federal question" involved in the pursuit of extralateral rights were reviewed by this court.

Now, so much for the manner in which the question was raised in the court below. I confess I cannot see how, by the mere assertion of objections to the court considering pieces of evidence, the attention of the court is called to the fact that there is any Federal question in the case. The mere asseveration and the repetition of that asseveration of a claim that the solution of the problems involved depends upon the construction of an act of Congress are not sufficient, in my judgment, to indicate a Federal question to the court. Perhaps if, upon the face of the record, the Federal question was apparent, the court might possibly dispense with the necessity of a specification.

Mr. WRIGHT: If it does not interrupt Judge Lindley, may I ask a question?

Mr. LINDLEY: Certainly.

Mr. WRIGHT: Was not the precise question in the Elgin

case raised by an objection to the construction of the patent to the Gilt Edge mine as a piece of evidence showing title?

Mr. LINDLEY: I must say I do not know; but if it was the Supreme Court did not express itself upon that question in the Elgin case. It did not express itself upon the Federal question in any of the cases counsel cited. But I shall point out cases where this court has specifically determined its want of jurisdiction in cases of this character. I have a list of three or four cases, one of which I claim is absolutely in point, where the question between the parties was similar.

The case I refer to is one where a senior locator owning the surface of a claim situated similarly to the Silva in the case at bar disputed the right of the junior locator, having the apex of the vein, to go underneath the senior location. The question was subsequently decided by this court in the [illegible] Monte case, and that question appeared upon the face of the record. The writ of error in the cause referred to was dismissed without specifying precisely the proposition in the opinion as to the lack of Federal question, but in a subsequent case this court construed the opinion in the case referred to, and I will, with the permission of the court, call attention to that case—the first case I have reference to—and I will state that these cases are not cited on my brief on motion to dismiss or affirm.

By agreement of counsel, I will state to the court, our oral arguments here are being taken down stenographically and we shall, at the close of the arguments, ask the privilege of the court, each one on his own behalf, to file the printed oral argument.

Mr. Chief Justice FULLER: Certainly.

Mr. LINDLEY: And this will contain all the authorities

which I now cite, and will be at the disposal of the court as soon as we can have the arguments printed.

Now, in this case of the Colorado Central Cons. Mining Company *v.* Turck (150 U. S., 138) the decision is by Mr. Chief Justice Fuller. The statement of facts is found preceding the opinion of the court, and set up substantially the same thing that the Pioneer sets up in this case. There was also a question of diversity of citizenship, but that is entirely irrelevant to the question under consideration here, and so I shall simply read those parts of the statement of the case which show parallelism between the case now under consideration and the case decided in 150 U. S., 138:

"Second. Plaintiff further alleges that upon the first day of January, A. D. 1885, he was the owner of seized in fee and entitled to the possession of a certain lode mining claim and premises, situate in Argentine mining district, Clear Creek county, Colorado, described as follows, to wit: The Aliunde Tunnel lode, No. 2, with all the dips, spurs, angles and variations of said lode throughout their entire length and depth and all other lodes, veins, ledges or deposits of mineral, the top or apex of which lie inside of said Aliunde Tunnel lode, No. 2, as patented to John Turck by certain letters patent of the United States, dated the 31st day of January, A. D. 1883, which lode, mining claim and premises are described in said patent as mineral entry No. 1862 in the series of the United States land office at Central City, Colorado, and designated by the surveyor general of the State of Colorado as survey lot No. 1494, which lode is 1,500 feet in length by 150 feet in width.

"Third. That said Aliunde lode No. 2 has a pitch to the northwest of about sixty degrees from a horizontal; that the top and apex of said lode lies within the side and end lines of said Aliunde Tunnel lode No. 2; that owing to the dip of said lode to the northwest, at a depth of about 300 feet be-

neath the surface of the ground, said Aliunde Tunnel lode No. 2 passes under the north side line of said patent and enters the land adjoining; that while plaintiff was so seized and possessed of said Aliunde Tunnel lode No. 2" ——

Then follows a description of the *locus* of the trespass and the ground from which the complainant was ousted. This was out from underneath the surface, just as the ore bodies are out from underneath the surface of the Pioneer.

"That plaintiff owned the property in fee, and was entitled to possession, and that the value of the rents, issues, and profits 'while said plaintiff has been excluded therefrom by the defendants, amounts to $250,000;' wherefore judgment was demanded for possession, damages, and costs."

The defendant answered by general and special denial, and asserted title to the lode mining claim under which or beneath which it was claimed by plaintiff this vein dipped, presenting, as I understand, a precisely parallel case to the one under consideration, with the exception that the question there was whether a location not having the apex of the vein, but being senior in point of time to the location having it, could be invaded by the junior apex proprietor—a much stronger case, I think, for illustration than the one at bar. The court, in its decision in the Colorado Central Consolidated Mining Company *v.* Turck, said:

"The jurisdiction of the circuit court was invoked December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. The Federal question now suggested did not emerge until the defendant set

up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication.

"The proposition that the right given by sec. 2322 of the Revised Statutes to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right against an adjoining claimant holding under a junior patent or certificate was afterwards advanced in certain instructions requested by defendant and refused.

"The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

"We are of opinion that the judgment of the circuit court of appeals was final under the 6th section, and that the writ of error cannot be maintained."

In the subsequent case of Blackburn *v.* Portland Gold Mining Company, 175 U. S., 571, where the opinion commences, but I shall read from page 584, where this case of Colorado Central *v.* Turck was discussed by this court:

"Colorado Central Consolidated Mining Company *v.* Turck (150 U. S., 138) was brought to this court on a writ of error to the circuit court of appeals from the 8th circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the circuit court of the United States for the district of Colorado, and determined in the plaintiff's favor. The case was taken by writ of error to the U. S. circuit court of appeals for the 8th circuit, and the judgment was there affirmed, and thereupon a writ of error was allowed to this court. The

case was here heard on a motion to dismiss on the ground that the suit was between citizens of different States, and that, therefore, under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals was final. An attempt was made in argument to sustain the right of this court to take jurisdiction, because, although the suit was between citizens of different States, yet that the solution of the dispute of ownership depended upon the construction and application of sec. 2322 of the Revised Statutes, concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed.

"While it is true that the conclusion reached was mainly put upon the ground that the record did not disclose affirmatively that any distinctive Federal question was involved, yet, as the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the circuit court could take jurisdiction irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question."

Mr. Justice WHITE: Does not this case come up on one of two conflicting constructions of statutes, if your lode should be construed as limited by the act of 1872 and the act of 1872 should be so construed?

Mr. LINDLEY: In response to that suggestion, I will say yes, but that is an infirmity of our patent, not of the Silva.

Mr. Justice WHITE: I am not speaking of that other question, but of the authority you cite as conclusive in this case. That authority held that the mere fact that there was a con-

troversy about a mining patent did not alone cause a Federal question to be presented.

Mr. Justice McKenna: More than that, did it not present a case which prevented the judgment of the circuit court of appeals from being final and not reviewable here?

Mr. Lindley: Under the judiciary act.

Mr. Justice McKenna: The judiciary act of March 3, 1891.

Mr. Lindley: I cannot understand the opinion upon any other theory. What was the court talking about in Blackburn *v.* Portland Gold Mining Co. except a Federal question?

In response to the question by Mr. Justice White, I will say that there is no opportunity in this case for a controverted construction of the various statutes. We say that under the act of 1872, in order to obtain an extralateral right, the end lines must be parallel. There is no controverted construction. The test of the investigation is whether the facts outside the Silva patent bring us within the terms of the act of 1872, and bring us within the restrictions of the act of 1872. Our rights are predicated upon the act of 1866, and that act was not referred to as raising a Federal question in the objection specified in the record.

Mr. Justice White: The objection does not specify any act.

Mr. Lindley: Yes; it specifies the act of May 10, 1872, and the Revised Statutes.

Mr. Garber: May I interrupt you?

Mr. Lindley: No objection.

Mr. Garber: It practically says that under no statute of the United States did they have that right.

Mr. LINDLEY: I do not see any such language in your Federal question.

Mr. GARBER: It is there.

Mr. LINDLEY: Well, Judge, be kind enough to point that out to the court. I do not see it here.

Mr. GARBER: I will find it for you.

Mr. LINDLEY: The controversy here is not over the proper construction of the act of 1872. It is over the rights that accrued, as we claim, under the act of 1866.

Mr. Justice PECKHAM: There ought to be a question of construction. That is what you speak of. What are the facts in dispute?

Mr. LINDLEY: There are no facts in dispute. They are all conceded and admitted. There are no facts except a physical existence of the lode itself having the apex outside the Silva patent.

Mr. Justice MCKENNA: Does not the application of the rights of the parties depend upon the construction of the acts of 1866 and 1872? Does not the opinion of the Supreme Court from beginning to end construe both acts?

Mr. LINDLEY: Very true; but, from the standpoint of the supreme court of California, it was dealing with what it called the common-law rights of the Silva, which arose from the presumption flowing from surface ownership. It certainly construed the two acts, but when we look for something in the record pointing out the Federal question to the trial court we do not find any mention of the act of 1866. It is not mentioned in this record.

Mr. GARBER: Let me read this from page 23 of the brief of the plaintiff in error:

"All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer quartz mine, lot No. 48, and by reason of the surface form or shape of said Pioneer quartz mine, lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer quartz mine, lot No. 48."

Mr. LINDLEY: Well, that does not meet the objection.

Mr. GARBER: That sustains my statement.

Mr. Justice MCKENNA: That appears on page 95 of the record.

Mr. LINDLEY: That appears in Judge Garber's brief, and I suppose it is in his objections.

Mr. Chief Justice FULLER: In the objections and exceptions?

Mr. LINDLEY: This case of Blackburn *v.* Portland Gold Mining Company was the first case that determined that an action on an adverse claim was not an action that arose under the laws of Congress so as to give the Federal courts jurisdiction.

Mr. WRIGHT: May I interrupt you a moment? We set forth on page 95 of the record the quotation read by Judge Garber. It may also be on page 65, but it is on page 95.

Mr. LINDLEY: In the Blackburn-Portland case the court reviews a great many of its antecedent decisions, and reaches the conclusion, as I have stated, that no Federal question was necessarily involved, because the controversy was as to the different rights under mining claims. I do not cite that case as being precisely in point, but I cite it because it contains a review of the decisions of this court upon kindred subjects.

The question as to what constitutes a Federal question and how far mere ownership of real estate acquired from the Government, where a right is attacked, involves a Federal question was suggested and discussed in the case of Gillis *v.* Stinchfield (159 U. S., 658), an action instituted in California concerning a mining claim, which was brought here on a writ of error to the supreme court of California to review a judgment of that court against the defendants for the value of certain gold taken by the defendants from the mining claim of the plaintiff. It was contended that the record showed that a Federal question arose in the case which could only be determined by an application of sections 2322 and 2336 of the Revised Statutes. The opinion says:

"The decision of the Supreme Court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad enough to maintain the judgment."

I think that case is authoritative in respect of titles derived under the mining laws of the United States that such titles may be legitimately determined by the State courts, but that to enable this court to review a judgment in such a case it must appear that there was a construction of an act of Congress adverse to the contention of one of the parties.

The test, I take it, with reference to these questions arising under grants is stated perhaps in a better way by this court in Rutter *v.* Shoshone Mining Company, in 177 U. S., which was a case reviewing the Blackburn-Portland case,

the opinion having been written by Mr. Justice Brewer. This court said, at page 505:

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws."

Now, I will cite these cases in my argument, so that they may be printed. I also cite the case of Bushnell *v.* Crooke Mining and Smelting Co., 148 U. S., 682. The Blackburn-Portland case is 175 U. S., 571. I am addressing myself to what, to my mind, appeared to be proper analogies in the discussion of this question. There is another quotation which seems to me to be quite apt on that subject, but I will look it up at recess, with the permission of the court.

Now, the fact is that if the Silva Mine, the plaintiff in error here, owns the ore bodies in dispute, it does not own them by virtue of any specific grant other than the presumption flowing from the ownership of the surface, because the law contemplates the exclusive right of possession to the surface, together with all veins that have their tops or apices therein; and the only manner in which the owner can claim title to these ore bodies is by the presumption flowing from surface ownership, which is essentially a common-law presumption, and has nothing to do with Federal statutes, any more than if it were a case of an agricultural patent, a town lot under the town-site law, or a pre-emption or homestead claim. If an agricultural

patent were junior in time, and where title to agricultural land would carry the same presumption that followed the title to the surface of a mining claim, how could an agricultural claimant assert a Federal question, so far as his agricultural patent is concerned, when the infirmities were not in his patent, but somewhere else?

Mr. Justice WHITE: Suppose this case, which I tried to point out yesterday: Suppose an agricultural patent issued to a man for 640 acres of land; suppose that somebody comes along and undertakes to claim and take out stone or coal or something under the surface; suppose the man sets up his patent and says, "I acquired this land from the United States, and the fact of the acquisition by me of that land from the United States and my rights under that patent were to give me the right to that coal, and you cannot take it away from me." Then suppose the court should hold that the other man could take it away from him, because by another act of Congress some man had a right to come in and take that coal in defiance of the first patent. Would you not say that that presented a Federal question, and that the denial of that man's rights could be reviewed here?

Mr. LINDLEY: It would depend very largely upon whether the grant purported to convey the coal. If it did, and there were reservation of title to the coal, it would not be necessary to construe any act of Congress.

Mr. Justice WHITE: You say there would be no Federal question to decide, if you decide; but how can you decide if there be no power to decide?

Mr. LINDLEY: If that be the correct answer to the problem, there is no patent to Government land where the right

to coal under it is taken away, but what involves a Federal question. If you cut timber from a claim, or invade an agricultural patent in any shape or form, and the court holds that somebody else is entitled to it and takes it away from your patentee, it necessarily involves a Federal question, because you have to look at the act of Congress under which the patent was issued.

I am admonished that my time is pressing, so I shall now have to take up the merits of the case, leaving the discussion of this subject for the present at least. I ask the indulgence of the court to deal with the merits of the case in rather an elementary way, or what we might call an evolutionary way.

The rights of the parties here have arisen, perhaps, in a period antedating the passage of any law of Congress with reference to the appropriation of mining claims.

Our conception of the thing in controversy here is a vein or lode, a body of mineralized rock lying in the mass of the mountain, usually embraced within defined walls, and occupying a more or less inclined position in the mass of the mountain. In other words, it is a distinct entity from the surrounding mass, and subject to severance by the paramount proprietor, and descends into the earth usually at some considerable angle from the horizontal or from the perpendicular.

In the beginning there was no law. The Government of the United States had passed no laws controlling the disposition of mining lands in the West, and so the miners started out to make a law unto themselves with regard to the acquisition, operation, and development of the mineral regions of the extreme West. I speak of the extreme West because

it was in California where the first discovery of gold took place, where the local rules and customs originated, and where the subsequent act of 1866, that being the first legislation of Congress upon the subject, was a crystallization of those local rules and customs. It was held by this court in Jennison *v.* Kirk and Broder *v.* Natoma Water Company and in a long line of decisions that the Government found that a system of laws had grown up in these mining camps of the West, and that large interests had become practically vested without the consent of the Government. But the Government, in its wisdom, saw fit to recognize those customs, and ultimately the rights existing by reason of these local rules and customs ripened into a higher degree of title. The Government recognized and crystallized these local rules and customs in this first congressional law.

Now let us see what the rights of the miner were on a lode when he first discovered it. These lodes, of course, do not outcrop ideally. It is very rare that there is an outcrop for any continuous length. The first act which gave him a possessory right, either under local customs or the later and higher law, was the discovery of the vein. When he discovered that vein he was entitled by the local rules of the vicinage to so many linear feet.

Mr. Justice PECKHAM: How many?

Mr. LINDLEY: It varied in different mining camps of the West. In many cases it was 200 feet on the vein, with 200 additional feet for discovery. That made 400 feet that a single locator might take. As evidence of what the miner had appropriated in linear length, he had to post a notice upon his discovery, and the extent of that notice was simply, "I hereby claim two hundred feet upon this vein (naming

it), together with two hundred additional feet by right of discovery." That was all that was done. There was no limiting the boundaries, no defining by surface lines enclosing the vein; and up to the time he applied for patent under the act of 1866 and enclosed that vein within certain definite boundaries, he had a right to follow it upon its course in any direction in which it might run.

The miners' law, as well as the law of 1866, was practically a law of one dimension. The miners' rights were measured by a rope. That was also the rudimentary instrument of miners' justice.

In addition to his number of linear feet upon the vein, he was entitled to what was called, in the vernacular of mining camps, all the dips, spurs, angles, and variations; and sometimes the vocabulary was expanded in an endeavor practically to get everything in width that he had not in length. Any reference to the surface was in connection with the lode; it was not for the purpose of defining rights on the lode, it was for the purpose of convenient operation of the lode. For instance, if he adopted some primitive method of dealing with his quartz as he extracted it he would be permitted, under the local rules and customs, or, in the absence of those rules and customs, to select a certain quantity of surface that would enable him economically to handle the ore. Sometimes it expanded into a reasonable amount and sometimes the local rules allowed him more than was reasonable. The only limitation to this quantity of surface was, in one locality, measured by the exigencies of the miner. In another it was fixed, sometimes bounding the vein on each side or at the end of the vein. So that when the act of 1866 was passed it adopted those local customs which

affirmed all the rights that had theretofore been acquired and perpetuated that same system.

Mr. Justice WHITE: May I interrupt you?

Mr. LINDLEY: Yes, sir.

Mr. Justice WHITE: Under the local customs—although this has nothing to do with this case—as I understand you, upon taking up that four hundred feet on the lode he was entitled to follow the dip of the vein, no matter how far it extended?

Mr. LINDLEY: Yes, sir; just as far as it would go; he might go through to China if he could.

Mr. GARBER: I do not think counsel understands the question.

Mr. Justice WHITE: I mean in its downward course or dip.

Mr. LINDLEY: We say all dips, spurs, angles, and variations. The spurs refer to the little subsidiary offshoots, but which form perhaps physically a part and parcel of the vein.

Mr. Justice WHITE: The miners' customs then had no limitations by vertical lines?

Mr. LINDLEY: No, sir; they had none, except as to length. There were no end-line planes there, and it was a great many years before it became necessary to establish anything of the kind, because the appliances for mining were primitive, and it was impossible to work at any great depth, and the remoteness of those camps from centers of civilization prevented the importation of machinery until later years.

Now, a lode has no more regularity in its course than it has in its depth. It does not necessarily pursue a straight line, even on a level, owing to the topography of the country

and the fortuitous nature of the exposures, and also, instead of following an ideal straight line, they would form in a circle or semicircle; it was more often in that shape than in a straight line. The first man came along and took up a claim. The next came along and tacked on to him; and so, by the time three thousand feet (which was the amount allowed under the act of 1866 by an association of persons) was reached, the extremities of the vein, if a straight line were drawn between them, would form the segment of a circle. Each miner having so many feet upon the vein, it was impossible, in my conception of the law, and the only conception, I think, is what Mr. Justice Field said in that great classic, the Eureka case, because we take our historical knowledge of the evolution of this law from the books of the tribunals wherein are fixed rights in controversy, and which have recognized and administered the local laws. So there was no conception, in the miners' laws, of an end line. Each miner had so many feet on the vein.

Mr. GARBER: What did Judge Field say about that Eureka case?

Mr. LINDLEY: He said end lines were implied; but what Judge Field meant by that, very clearly, was that he could not go beyond his linear measurement on the strike or course of the vein. That is all that was meant, as we shall see. Whenever the miner undertook to inclose that vein within a surface, that, by interpretation of the courts at least, marked the limits beyond which he could not go on the course of that vein. For instance, if he claimed, as in the Flagstaff case, 2,600 feet, and made the location so that he included only 100 feet, he only obtained the one hundred feet. His error arose in marking the

location at all. But if he did mark it, he was bound by it, because that was notice to the next comer. So it is very easy to conceive that what we might call the end lines of these claims were every which way. Take the lode upon which this claim is located. The mother lode traverses nearly one hundred miles, from Mariposa county clear over into El Dorado county, and there are locations all along that line of lode, farms and homes, of course, intervening where the lode had not been discovered at the surface; but you find a man located on one part of that lode and another on another part; then subsequently the different claimants working together. But there are changes in the course of the vein and irregularities in the surface form, even when they mark their boundaries. Here is a case of diverging end lines. The North Star case was a case of converging end lines. The Central Eureka, now before the supreme court of California, was one of those vacant spaces between the two boundaries the end lines of which were not parallel. The miner took what was left, regardless of mere form of surface.

With your honors' permission, I would like to read what this court has said about this very condition of affairs we are leading up to in connection with the discussion of the extralateral rights allowed the Pioneer, or the Argonaut, as they call it. I am simply making a statement to show the processes of evolution, how the Pioneer emerged from its primitive condition to a patent issued by the Government of the United States, and what was the intent and spirit of the law under which its rights accrued. The main object of the miner was the lode; the surface was a mere incident.

As this court said, speaking through Mr. Justice Brewer, in the Del Monte case (171 U.S., 55, 64):

"The purpose herein manifested was the conveyance of the vein, and not the conveyance of the certain area of land within which was the vein. * * * Nowhere was there any express limitation as to the amount of land to be conveyed. * * * Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area, or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface 'as was fixed by local rules,' or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine.

"As might be expected, the patents issued under this statute describe surface areas very different, and sometimes irregular in form. Often they were like a broom"——

That was the case of the famous Idaho mine, in California, the patent to which described the shape of a broom. That was the shape referred to by Mr. Justice Brewer in his opinion. That was one of the early patents issued under the act of 1866, and showed the conception of the Land Department at that time as to the manner in which these claims should be patented. Now, says this court, continuing:

"Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight, or in a curved irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable

size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules, giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area."

Mr. Justice Field, in speaking for himself and the three judges sitting on circuit in California and Nevada (sitting with Judge Hillyer and Judge Sawyer), presiding at the trial of this famous Eureka case, to which I shall invite your attention shortly, in summing up this situation, said:

"If it is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode, is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course or to follow the dips, angles and variations of the vein, or control the direction he shall take."

If the locator did describe this surface area, including the vein, he could not have but that one. The other one, subject to certain limitations as to entry upon his ground, was subject to location by some one else. What my distinguished adversary calls ancillary lodes are not an every-day occurrence. They are rather rare in the gold regions of California, where the miners' rules and customs had their inception. We do encounter them sporadically in the administration of the mining laws, and that invites attention to the fact that such things were contemplated when the act of 1872 was passed. But the possession of those ancillary lodes has been magnified to a very large degree by the exigencies of the counsel's case.

Mr. GARBER: I stated it just as I have experienced it.

Mr. LINDLEY: Perhaps our experiences have been different. The Comstock lode was the earliest experience I ever had. It was wide enough to take in pretty near all creation; but there was no ancillary lode, according to the testimony of every one. We concede, of course, and the act of 1872 recognizes, the possibility of the existence or the fact that these secondary lodes or ancillary lodes exist. We sometimes call them subsidiary, because there is a principal lode, which a man discovers and locates, and these others are those that fall to him by fortuitous incidents, which he could not have foreseen. So I distinguish between the original lode, as was the Pioneer in this case, and such other lodes as might possibly be in the ground. But there are no other lodes in controversy in this case. The whole controversy in this case is over the original lode, the one located under the act of 1866, and the one passed to entry before the act of 1872 was passed. The record here shows that the controversy here is over the original lode patented to the Kennedy and the Argonaut, respectively.

Now, I wish to invite the attention of the court to a suggestion or question of Mr. Justice Peckham yesterday as to how there come to be converging lines in the construction of these rectangular end-line planes on the main vein, the top or apex of which traversed the Pioneer and also the Kennedy quartz mine, which is likewise owned by the plaintiff in error. There was a controversy between the Pioneer and the Kennedy as to the position of their common boundary and to the rights of the two parties on this vein.

Mr. GARBER: Not these two parties.

Mr. LINDLEY: You call yourselves the Kennedy Milling

and Mining Company. I am not stating this for the purpose of doing anything more than answering the question that Mr. Justice Peckham asked.

There is a compromise agreement in the record. The trial court ignored that because it did not think it was necessary to be considered, I suppose; but there is a compromise agreement that the surveyor should draw the common boundary on the lode between them at right angles to the strike of the vein at the point where the common boundary now exists. In defining this rectangular line the surveyor gave the Pioneer a little bit the worst of it. In other words, the line A^2 (on map Exhibit A) would be strictly the rectangular line; but that is to the north of the extended, or what we may call, for the purpose of designation, the compromise line. We are not now insisting upon this compromise agreement, except by way of estoppel, which is referred to in the latter part of my brief, and which I shall reach in due course. Neither the supreme court of California nor the trial courts gave any weight to that compromise agreement, but we are explaining that we are short and have slightly converging lines when you apply the rectangular planes to the strike at points of the vein within the surface area by reason of the compromise.

Mr. GARBER: That compromise agreement was excluded when offered in evidence.

Mr. LINDLEY: We all agreed upon the facts. Then each party reserved the right to object to the consideration by the court of any particular fact or series of facts.

Mr. GARBER: I beg your pardon. We agreed upon the facts, subject to all objections as to admissibility.

Mr. LINDLEY: Is not that the equivalent of what I say?

Mr. GARBER: I think not.

Mr. LINDLEY: Well, I accept your amendment.

Mr. Justice BREWER: Did the Kennedy mine own that other location?

Mr. LINDLEY: Yes, sir. The Kennedy Company, the present plaintiff in error, started a shaft in front of the apex, first a vertical shaft, and ran it until it reached the vein, and then followed the vein in its downward course. The Kennedy started its shaft, and then crossed over the common boundary line between the Kennedy and the Argonaut or Pioneer, and commenced to extract ore from the south of the common boundary, and that started this suit. They then defended under the surface ownership of the Silva. That claim was located twenty years after the discovery and location of both the Pioneer and the Kennedy, the Silva quartz mine being presumptively—absolutely, conclusively—possessed of the apex of another vein away to the east of the Pioneer and Kennedy mine. That started the suit. The first intimation that we probably had of the assertion of the rights of the Kennedy Company to the Silva was at the time the suit was started.

Now, I have explained to the court how these inequalities might very readily occur in making these linear locations. Here we find (pointing to the map)—perhaps looking for an excuse—a reason why there should not be a parallelism, if such a conception was in the mind of the locator, the survey having been made before there was any law requiring the vein to be enclosed. We find that the south line was coincident with the quarter-section line.

Mr. GARBER: Did not the law of 1866 require the vein to be enclosed?

Mr. LINDLEY: No.

Mr. GARBER: Was not that the decision in the Flagstaff case?

Mr. LINDLEY: No, sir; I have just read the language of this court, which said that sometimes the location was in the shape of a broom.

Mr. GARBER: Did not Justice Brewer in that decision state——

Mr. Chief Justice FULLER: I think we had better proceed without interruption.

Mr. LINDLEY: What Justice Brewer said I read from his decision. If we are wrong, of course I would like to have the court correct me.

While on that subject, if your honors please, I will give an illustration of what counsel possibly refers to. In the case of New Dunderberg *v.* Old, one of the cases cited by counsel, there is an illustration of how the miner lost his vein by making his location so as to include it within surface boundaries. I shall have occasion to refer to this case again, because it is cited by counsel as if it were an accepted patent under the act of 1872 and stands under that act. These locations were in Colorado, where the limit of width was fixed at fifty feet. The Dunderberg claim is a long one, being three thousand feet, allowed by the act of 1866. The discovery point is indicated where I now rest my pointer. He claimed three thousand feet upon the vein, and ran his lines so that they might cover the vein to the extent claimed. But he mistook the course of the vein, for it ran diagonally across his claim and entered the Frostberg location. The court very properly held that his right to follow

that vein on its course stopped where the vein, on its linear course—what we call, technically, the strike—passed out of his claim. That was precisely the situation in the Flagstaff case, where the locator undertook to define the boundary, calling for 2,600 feet. The patent for Dunderberg having been applied for and issued under the act of 1872, although the location had been made under the act of 1866, the court says that the Dunderberg owners did not lose the vein because the act of 1866 was repealed, but lost it because they undertook to define their boundaries and mistook the course of the vein. I will refer counsel to the precise language of the decision. Here is what the court says in regard to that:

"But it was not the repeal of these sections of the act of 1866 that affected the rights of the owner of the Dunderberg lode. That repeal did not deprive him of any right he had to follow his lode into the Frostberg claim. It was his location, entry and patent of his claim, from which the lode departed on its strike 309 feet before it reached the Frostberg, that affected his rights."

79 Fed., 603.

That was taken out under the act of 1872. I shall have occasion to refer to that case again in a few moments.

Now, on the subject of end lines under the act of 1866, we have an abundance of authority to the effect that under that act end lines were not required to be parallel. It was not a mere sporadic remark by the court incidental to the investigation of the case, but it has been solemnly stated by this court in a great many cases, comparing the language of the act of 1872 and the act of 1866. We have excerpts from the decisions of some seven or eight cases in different courts in the mining regions of the West, as well as this court.

For instance, Mr. Justice Field, in the Eureka case (4 Sawyer, 302), says:

"In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations were not required."

That case was affirmed by this court in Richmond *v.* Eureka (103 U. S., 89).

Mr. Justice Field, in the Iron Silver Mining Company *v.* Elgin Company (118 U. S., 196), speaking for this court, says:

"Under the act of 1866, parallelism in the end lines of a surface location was not required."

Again, we find the case of Walrath *v.* Champion Mining Company (63 Fed., 552), a case which came to this court, wherein it was said:

"Under the act of 1866 parallelism was not required."

Also, in the case of Carson City G. S. Mining Co. *v.* North Star Mining Co. (73 Fed., 597), to the same effect. There a patent had been obtained for some sixty acres of land, which patent was issued after the act of 1872 was passed, and enclosing a vein where the end lines converged in the direction of the depth. The courts in these cases were dealing with the rights of the parties arising out of those old locations. There are diagrams in these different cases showing the different situations of different properties in my printed brief, and they will show an apt illustration of the object of the court in using this particular language. In this par-

ticular case of Carson City Co. *v.* North Star, which, by the way, was referred to by this court in a later decision, it was said:

"The act of 1866, under which the rights of the defendant in error accrued, did not require parallelism of end lines."

The same doctrine was practically reiterated by this court in the case of Del Monte M. and M. Co. *v.* Last Chance M. Co. (171 U. S., 55, 67). Said the court:

"There is no inherent necessity that the end lines of a mining claim should be parallel. Yet the statute" (act of 1872) "has so specifically prescribed."

The court here took a recess from 2 o'clock to 2.30 p. m., after which Mr. Lindley continued his argument.

This being the underlying principle of the act of 1866, let us examine the proceeding under which was acquired the title to the Pioneer or Argonaut mine. The proceeding is somewhat similar under the existing law. It is actually so, so far as the legal effect of it is concerned. It is a proceeding *in rem*, so characterized by the courts, where the claimant was called upon to file a diagram, as the act expresses it, of his lode or vein so extended laterally—referring, of course, to such of the surface as was allowed by the local rules and customs—as will satisfy the rules and customs in vogue in the neighborhood. He was then required to post and publish a notice of his claim and of his intention to apply for a patent. By this process of posting and publication every one was summoned to appear and show cause why the patent should not issue in conformity with his

claim as shown on the diagram posted on the ground and in the local land office. There being no adverse claim to the lode or to the surface ground connected with it, as shown upon the diagram, the claimant was permitted to enter the vein and the surface ground as exhibited on the diagram, paying therefor to the Government $5 an acre in case of lode claims. This culminated in the issuance of a receiver's receipt or certificate of purchase, which, in the absence of any attempt on the part of the Land Department to correct it for errors or irregularities, has the effect of conveying what this court has denominated the complete equitable title.

The predecessors, in title, of the Argonaut Company had proceeded that far before the act of 1872 was passed. They had made the entry at the land office, paid the entry fee and purchase price, and received the certificate of purchase. Thus the situation stood when the act of 1872 was passed.

The act of 1872 was framed on altogether different theories. There the locator was called upon and required to inclose his lode within certain defined surface boundaries, the maximum of which was 300 feet on each side of the center of the vein. While the act of 1866 granted but the one lode, the act of 1872 purported to grant all the lodes other than the original one which might be found within the surface. That was the first time there was incorporated into any law the requisition for parallelism of end lines.

I have now reached a point where I think I can outline to this court in a succinct way the position that the defendant in error here takes regarding all the controverted questions, passing the one of jurisdiction, and this will enable us to define sharply the difference between the position of

counsel for plaintiff in error and that of counsel for defendant in error.

We contend:

I.

That prior to the passage of the act of May 10, 1872, and during the period embracing the discovery, location, application for patent, and the final entry in the land office of the Pioneer lode and the surface embracing it, the principal thing acquired by a lode locator was the vein. The surface was a mere incident, not controlling the rights of the locator so far as depth was concerned. In the language of the act of 1866 and according to the miners' vocabulary, he was entitled to the vein throughout the claimed length, with all its dips, spurs, angles, and variations.

II.

While the act of 1866 contemplated the existence of end lines of a lode location, in the sense that such boundaries marked the limit on the course of strike of the vein beyond which the miner might not go, such boundaries did not necessarily determine the direction to be given to vertical planes bounding underground rights. Each subsequent locator on a vein adjusted himself to the rights of the first comer, and the boundaries between them underground were regulated in the order of priority.

III.

The law of 1866, being a law of one dimension, the right of the locator in the vein was measured horizontally at the surface along the course of the vein, and vertically by planes

drawn through the vein at the extremities of the length claimed at the surface, and at right angles to the general course or strike of the vein, which course or strike was defined by connecting the two extreme terminals.

IV.

The locator was not called upon to enclose the vein at the surface within any defined boundaries. The form and extent of the surface claims was not fixed by the law, but was regulated either by local custom or by the selection of the miner, within reasonable limitations, of surface in such form as might be essential for use in connection with the lode.

If, however, the locator saw fit to define a surface area surrounding or purporting to embrace the length on the vein claimed by him, he was not permitted to pursue the vein on its course beyond those defined limits. Prior to so defining his surface limits he might pursue the vein on its course, in whatever direction it might run, for the length claimed. Perhaps this limitation on underground rights, where there was a definition of surface boundaries, was between planes drawn vertically through the lines of the location crossing the lode, at least so long as these lines were substantially at right angles to the general strike of the vein within the location. Were they greater, or divergent, so as to cause inequalities in depth, the rectangular limitation prevailed. If they were less, or convergent in the direction of the downward course, it is possible that he was limited to those convergent planes and could not go beyond them, and to the extent of the convergence the rectangular principle

yielded to the course of the converging end lines. We do not say that this was the correct rule, but we say that this is all that can be claimed, so far as the force of surface boundaries under the act of 1866 is concerned.

V.

If we assume, for the time being, that the Pioneer had passed to patent at the date of the entry, in February, 1872, prior to the passage of the act of May 10, 1872, there can be no question but that under the law of 1866 the owners of that claim would have been granted underground rights on the original vein, at least between vertical planes constructed at right angles to the course of the vein, at the north and south extremities of the vein within the location, as determined by the supreme court of California in the case at bar.

VI.

Prior to the passage of the act of 1872 the claimant of the Pioneer vein had applied for a patent for 1,589.96 feet of the Pioneer vein, and for the surface for its convenient working, as shown by the patent survey. He had, pursuant to the law of 1866, filed the diagram of his vein, so extended laterally as to embrace such surface as he claimed, either as necessary for convenient working or as allowed by local rules.

(The issue of a patent, as has been held by this court, is conclusive evidence that the amount of surface specified in the patent was such as was allowed by the local rules. I will comment shortly upon the Lakin *v.* Dolly case, but I understand that to be the principle—the amount of surface

specified in the patent was presumptively that allowed under the local rules, so far as the act of 1866 was concerned.)

Notice of the extent and nature of his claim was then given, pursuant to the statute, by publication and posting on his claim. There were no adverse claims, and in due course he entered the property at the land office, paid the Government the price, and received his certificate of purchase.

VII.

The issuance of this certificate of purchase, following the payment of the purchase price, vested in the claimant the complete equitable title. While the Land Department retained jurisdiction for the purpose of reviewing and testing the regularity of the proceedings culminating in the issuance of the certificate, this supervisory control was not an arbitrary one, and its exercise was limited to the correction of irregularities in the proceedings or substantial departure from the method prescribed by the law under which it was issued, or to vacating the entry should fraud be established. This reserved power could only be exercised upon notice to the purchaser, who had a right to be heard before his status as such purchaser could be altered to his detriment. No such supervisory power was exercised. The patent subsequently issued was based upon this entry, the integrity of which had not been questioned. This entry is recited in the patent and specifically found by the trial court.

It is familiar to all of us that before a patent issues there must be an entry. This patent recites that this entry was made in February, 1872. Consequently, there can be no

suggestion that there was any exercise of this reserved power by the Land Department for the correction of any irregularities. There were no irregularities, because the patent recited that the claim had passed to entry in February preceding the passage of the act.

Mr. Justice McKENNA: You claim that he complied with the requirements and received his patent strictly under the act of 1866?

Mr. LINDLEY: We did comply, and went to entry under the act of 1866.

Mr. Justice McKENNA: But the patent was taken out under the act of 1872; at least that is the contention on the other side.

Mr. LINDLEY: The patent did not issue immediately, because the magnitude of the business of the land office did not permit. It was issued, however, in the regular course of business.

Mr. Justice McKENNA: They say on the other side that it was issued under the act of 1872.

Mr. LINDLEY: But I say that it was issued under the acts of 1866, 1870, and 1872, because there were provisions in the act of 1872 preserving rights that had been acquired theretofore. The patent was issued under the act of 1866. It also recites that it was issued under the act of 1870, which was supplemental to the act of 1866, and also under the provisions of the act of 1872; that is to say, the authority for the issue of the patent at that time may be considered to be the act of 1872, which preserved rights as they had existed, and related back to the entry which was made in 1866, there having been no adverse claims.

Mr. Justice McKENNA: Do you claim anything additional by reason of the act of 1872?

Mr. LINDLEY: We do not.

Mr. Justice McKENNA: You simply claim under the act of 1866?

Mr. LINDLEY: We do not claim anything additional, with this exception—and I will reach that in a moment—with reference to the flaring lines.

Mr. Justice McKENNA: Proceed.

Mr. LINDLEY: I will reach that in a moment.

VIII.

The payment of the purchase price and issuance of the certificate created a vested right, which the Land Department could not destroy, nor would Congress have the power to divest such a title by supplemental, repealing, or amendatory legislation.

IX.

We have a right to conclude, as corollary to the foregoing principles, that unless the owner of the Pioneer vein has, of his own volition, done or suffered to be done some act which amounts to a revesting in the United States of the rights conferred by his entry, such rights were merged and defined in the patent.

X.

The act of May 10, 1872, was framed on different principles from those embodied in the previous legislation. By that act controlling force must be given to surface boundaries. As a condition precedent to the exercise of what is now known as the

extralateral right, parallelism of end lines of the surface location was required. The act of 1866 granted but the one lode. The act of 1872 granted all lodes whose tops or apices were within the surface boundaries. It distinctly and in unqualified terms reserved all rights which had been acquired under existing laws, and I may say in four distinct places in the act preserves all rights which had been acquired under pre-existing law. It also purported to convey additional rights—that is to say, the other lodes; in other words, to grant something more than the locator or patentee had acquired under the prior laws.

As to the so-called other lodes, or any additional privileges granted by the act of 1872, it may be, for the purposes of the argument, conceded that Congress had the full power to impose the conditions under which such additional rights might be acquired or might vest. If these conditions did not exist, or the law was not complied with, the act and the patent issued under it would not vest title to the "other lodes." Therefore a patent issued subsequent to the passage of the act of 1872 and based upon an entry made prior thereto might be perfectly valid as to the right on the original lode confirmed by the act which had previously vested under the entry, and be considered as inoperative as to the additional or other lodes by reason of the non-parallelism of the end lines. In other words, the patent may be valid as to the linear feet on the Pioneer vein, and inoperative or void as to other lodes, if there might be any.

XI.

There are no "other lodes" in the ground in question. The sole controversy in this case is with reference to the original lode. The agreed statement of facts makes this perfectly plain. The patent conveys the surface ground entered under the act of 1866 and 1,589.94 feet of the Pioneer vein. It recites that it is issued under the provisions of the prior act; that it purports to grant other and additional lodes, which grant may be subject to the criticism of invalidity, but this does not detract from the value of the grant, so far as it pertained to the complete equitable rights theretofore vested and evidenced by the certificate of purchase, as to the original lode and the surface.

XII.

The act of 1872, we think, is susceptible of the construction that it granted, not only all rights theretofore conferred, as to surface ground and the original lode, to the extent named, and in depth indefinitely between rectangular end-line planes, but also granted the vein in depth within the divergent end-line planes.

We have considered that it was the old law which did not provide for parallelism of end lines; the mischief, which gave more in depth than at the surface; and the remedy parallelism of end lines where there were no adverse rights—and the statute so states possibility of conflicts were eliminated—by conferring upon parties who had these irregular locations underground rights within their end-line planes regardless of their direction. But the exigencies of this case do not require that such a question should be de-

termined. All the property here in dispute is within the rectangular end-line planes. The Silva ground claimed by plaintiff in error overlies the dip of the vein and is within the prolonged rectangular end lines of the Pioneer, as defined by the decision of the supreme court of California.

I wish at this juncture to call attention to the fact that the act not only in terms granted these additional privileges to locations held under the act of 1866, but specifically granted them to holders of *patents* issued under that act. Section 9 of the act of 1872 provides that these additional rights shall accrue to the patentees under the prior law where there was no possibility of surrendering or exercising volition and taking something in compensation for surrender, thus indicating by the language of the statute the purpose of Congress to make that stipulation as to the additional rights operative not only to patents with irregularly shaped surfaces, but also to locations irregular in shape. But, as I say, the exigencies of this case do not require that we should insist, or that this court should take the responsibility, if it does not desire to do so, of determining that the act of 1872 gave us the flaring end lines. We are not here claiming absolutely that such is the case. We have suggested it because we think that the statute is susceptible of that interpretation. But the rights of the defendant in error are not necessarily predicated upon that principle. We adhere to the strict right granted us under the act of 1866. The patent simply confirmed these rights, giving us the legal title, we having had theretofore the complete equitable title.

XIII.

The contention of the plaintiff in error, that the owners of the Pioneer vein divested themselves of all extralateral rights by accepting a patent with non-parallel end lines, is, we respectfully submit, predicated on a false premise.

The act itself contains no language which justifies the assertion that the holder of the complete equitable title was called upon to make an election between standing upon his vested title or to surrender part of it and take, in addition, the possibility of something more which the act authorized. The purchaser had no notice, no warning. His attention was not called to the fact that he was called upon to surrender and reconvey to the United States some part of what he had theretofore purchased and paid for in return for something he never asked for, and, in fact, which never existed, to wit, "other lodes." When he received this patent he saw by reading it, it is printed in the record, that it purported to be issued pursuant to the law under which he had entered and paid for the property; that the patent conveyed the property he applied for, to wit, the tract surveyed in connection with his vein, and 1,589.94 feet of the Pioneer vein throughout its entire depth. That is all that concerned him. That is all that he had any knowledge of. Having done all that the law required of him prior to the passage of the act of 1872, in the absence of some adequate provision of law requiring him to elect whether he would remodel his lines, go back and reopen that closed proceeding *in rem*, carve off something which had already been granted to him, and make new lines requiring a new publication, a new proceeding *in rem*, he was entitled to rest upon his title as evidenced by

his certificate and confirmed by the new act. If Congress had ever intended that he should take any other or affirmative steps to protect his antecedent title, it would have said so in express terms and not left it to surmise.

Having done all that the law required of him prior to the passage of the law of 1872, he had a right to rest secure in the faith that when his patent was issued the Government would fulfill its obligation and convey to him what he had discovered, located, developed, entered, and paid for.

If counsel's contention is correct, the patentee voluntarily accepted a patent which, on its face, deprived him of the only thing of value which he had purchased and paid for, to wit, the Pioneer vein, for the sake of obtaining something in the shape of other lodes which never existed, and to which the patent conveyed no title beyond vertical planes drawn through the surface boundaries—in other words, he would be placed in the position of surrendering to the Government everything he had of value, and getting nothing of value in return, because counsel says the patent does not convey anything except what was within the surface boundaries drawn down vertically. It seems to me that the placing of any such construction as that upon the act of Congress is doing violence, great violence, to the true spirit in which these acts have always been construed from time immemorial. Both the State and Federal courts have looked generously and kindly towards the prospector and the miner. They have adopted his primitive methods, have encouraged his primitive ideas, and have always relaxed technical requirements of the law in the interest of the man who goes into the mountains to discover and develop the hidden wealth of the country.

In face of the fact that locations are construed most liberally, that the acts of Congress are construed most liberally, and in face of the asseveration made repeatedly that all rights heretofore existing shall not be affected by this law, counsel says that that rule of interpretation, that strained and impossible construction, shall be placed upon the mere innocent acceptance of the patent delivered to him in the course of the ordinary prosecution of the business of the land office, without warning.

Mr. Justice McKenna: May he not have taken chances like that taken in the case of Walrath *v.* Champion Mining Company, which involved something like $300,000, and where a patent was taken out for what you call an ancillary or subsidiary vein?

Mr. Lindley: But in that case, if your honor please, this question of diverging lines did not enter.

Mr. Justice McKenna: I know it did not enter, but the fact was in that case that there was a different vein from the main vein.

Mr. Lindley: Very true.

Mr. Justice McKenna: And that contention involved rights to the value of $300,000. So it might be—I do not say that it was so—that a party would deliberate as to whether he would take a surface grant or claim extralateral rights.

Mr. Lindley: The value that your honor speaks of in that case was not within surface boundaries. It was the extralateral right.

Mr. Justice McKenna: It was on another vein.

Mr. Lindley: It was on an ancillary vein; but your honor, writing the opinion of the court, said that the extra-

lateral right upon that other vein should be determined by the end lines of the original location. That is the contention we make here, so far as our present extralateral right is concerned, because that is the literal language of the statute.

Your honor also, in speaking for the court, held that the end lines of the location were those marked upon the survey, and in this case we would have these end lines, unless you take the other section, which requires parallel end lines, and make it apply to lodes heretofore located.

The Walrath-Champion case is a precise authority or precedent for our contention for the flaring lines. Otherwise that decision must be qualified by saying that one may have extralateral rights in other lodes within the claim only if the end lines of the previously patented claim are parallel.

Now, the claimant did not even have the chance of getting anything outside of his boundaries. If the interpretation of the law contended for by counsel was correct, he was confronted with an instrument which, on its face, was, to use the vernacular, a "gold brick." It conveyed nothing but a very small part of the vein, his own original vein, and he must have had notice that he was giving up everything for nothing, because he would have no extralateral rights on the other veins, and consequently he could not be taking chances. But he did not have that opportunity to speculate.

Certainly the United States had no thought of trapping its beneficiaries into receiving a worthless instrument. If Congress had ever intended that so valuable and important an attribute to a lode claim as the underground rights, confirmed and granted under prior laws, was to be made the

subject of readjustment to conform to new policies and new restrictions, it is but fair to presume that some notice and warning would have been given to the purchaser, to whom the faith of the Government had been pledged.

There is no such provision made for patentees. They get the benefit of this act because, fortunately, the patent was issued. So, if the patentee under the act of 1866 should be the beneficiary of the law of 1872, why should not an entryman? What is the difference in principle? There was no provision of law compelling the patentee to surrender his patent and take out a new one.

XIV.

So far as any reserved power in Congress is concerned to regulate the mining industry on the public domain, no construction of its legislation is permissible which will sanction its right to deprive a person of vested property rights. Whatever it might do, while the property is located, vested simply in possessory occupation, after the miner had applied for his patent, made his final entry, paid his money, and received his complete equitable title, it was beyond the power of Congress to take it away.

Now, if your honors please, those are the principles upon which we think the case rests before this tribunal. These are the principles which we have endeavored to establish by authorities quoted in the brief.

I now desire to invite your honors' attention for a few moments to the Eureka case. On page 26 of my argument I have printed a reproduction showing what we claim here and what I claim to be in principle the authority for the flaring lines.

There has been a great deal of confusion of thought about this Eureka case. Hardly any mining case of importance comes up before western courts but that one side or the other, or both sides, cite the Eureka case for some purpose. It has elastic properties. It is one of the early classics. The decision was rendered by Mr. Justice Field, sitting as a circuit justice, in a controversy over the ore bodies underneath the Arctic and Atlantic location belonging to the Richmond Company. We have this situation parallel to the one at bar, in the fact that we have the Richmond occupying the relative position of the Kennedy, claiming the ore bodies to the south of the common boundary between the Richmond and the Eureka properties, by their surface location overlying the dip of the vein. There was a great controversy whether it was a lode in that case. It was in the limestone formation, lying in a zone, if you please, between shale and quartzite. The zone was very wide, the lode or the vein material, the ore being found in irregular chambers in the limestone, which had been eroded by the erosive action of water. The contention of the Richmond Company was that it was a pipe vein—that is to say, instead of having the dimensions of length, breadth, and thickness, it ran like a water pipe or sewer pipe put diagonally down into the ground. Their contention also was that, because of the non-parallelism of the end lines, there were no extralateral rights belonging to the Eureka, and therefore, by virtue of the surface ownership of the Arctic and Atlantic, the Potts ore chamber, the particular bone of contention at that time, belonged to the Richmond. This ore chamber was bisected by the common boundary between the two claims, just precisely as is the case

in the Pioneer; substitute Silva for Arctic and Atlantic and you have precisely the situation upon the assumption I have made and as to which no reading of the opinion can prevent the conviction that the court passed upon the element of non-parallelism of the At Last and the Lupita, the tops of the vein being found in all three of the patents. That was the finding of the trial court, and is referred to in the opinion of the Supreme Court of the United States.

Mr. Justice McKenna: That is, it was found in the Eureka and Richmond?

Mr. Lindley: The Champion, At Last, and Margaret or Lupita.

Mr. Justice McKenna: Where is the Champion?

Mr. Lindley: The At Last, the Margaret or Lupita, and the Champion all three belonged to the Eureka Company. All that the Richmond had was this segment of the vein, and it followed down just as the Kennedy had done in this case, by means of its underground location, and had cut across its boundary. It claimed, first, the character of the vein to be a pipe vein, and that they had the right to follow it wherever it ran; and in my humble judgment it was that contention that caused Judge Field to talk about coming in and ousting the neighbors following this gas-pipe vein.

The fact remains, however, that the end lines of at least two of the claims were not parallel, and the fact remains that that was litigated strenuously and fought out in the trial court and in this court. It will not do to fritter that case away by the assertion that all rights could have been obtained under the Champion patent, because this principle was discussed and was determined. It is hardly fair at this time, inasmuch as the mining industry has been developed

on the faith of such construction made by this court, in the face of such language used by this court—it is hardly fair now to say that it was entirely unnecessary.

But we find precedent beyond the Eureka case showing the fact that the end lines were not parallel did not deprive the party of his extralateral right because the ore bodies, as found and confirmed by this court, were between lines drawn at right angles to the general strike of the vein and also between extended diverging end-line planes.

Now, if your honors please, I must pass the Eureka case with this additional suggestion: That there was also a compromise line in that case, crossing the lode, and there was a controversy whether that line would simply define the boundary between the Richmond on the one hand and the At Last, the Margaret or Lupita, and the Champion on the other, or whether the line could be extended so as to cover the dip of the vein. Those were the two propositions. They were both considered by this court. That case has been the precedent for the statements so frequently made and encountered in the decisions of this court—for instance, in the Elgin case and in the Del Monte case—wherever this court has been called upon to determine the difference between the two statutes of 1866 and 1872, that end lines were not required to be parallel under the act of 1866 and did not define the miners' rights in depth of vein. Judge Field said in that case:

"Lines drawn vertically down through the ledge or lode at right angles with a line representing this general course at the ends of the claimant's location will carve out, so to speak, a section of the ledge or lode within which he is permitted to work and out of which he cannot pass."

Judge Field was like Æneas at the siege of Troy, so far as mining law was concerned, the greater part of which he was and all of which he saw. He was part and parcel of the mining institutions of California. So I think he was the author of the California statute which provided that the rights in mining claims should be adjudicated by the courts according to the rules or customs of the locality. His expressions at that point of time, not found in the Eureka case—a time far removed from the passage of the act of 1872—are the principles which have governed up to the present time. The situation was thoroughly fresh in his mind at that time, and I do not think that his language should be held to be meaningless, that what he said there he did not mean, and that we have no right to rely upon it.

Counsel cites the Flagstaff case under the act of 1866, where, if a man made his location so that he only got 100 feet of vein within the lines, that was all he received. That same rule was followed in construing the act of 1872. The two acts are precisely similar in that regard.

That is illustrated upon the diagram of the Dunderberg lode. That lode was applied for, according to the language of the opinion, after the passage of the act of 1872. The Frostberg lode occupied precisely the same position as the Argonaut in the case at bar. In that case the circuit court of appeals said that the owner of the Frostberg lode had done everything he was called upon to do before the act of 1872 was passed; had filed his diagram, entered the land and paid for it and got a certificate of purchase, and he was awarded the other lode. That is, the Dunderberg lode extended across through the Frostberg. (See large diagram.)

That same rule was followed in the Argentine-Terrible case under the act of 1872, decided by this court.

If your honors please, I would like to read into the record some additional authorities upon the effect of the certificate of purchase and the supervisory power of the Land Department over it. I cite to your honors Simmons *v.* Wagner, 101 U. S., 260; Cornelius *v.* Kissel, 128 U. S., 456, 460, wherein the court uses this language:

"When the tract which was subject to entry was thus purchased and paid for, it ceased to be subject to the disposal of the United States. It was not in equity their property."

In the case of Rice *v.* R. R. Co., 66 U. S., 358, 374, it was said:

"If the legal effect of the act of Congress was to grant a beneficial interest in land, it is clear that it was not competent for Congress to pass a repealing act and divest title."

Suppose we stood here and were told that Congress had absolutely repealed the act without providing any substitute, where would we be? Could Congress take away the right acquired by location and entry of a mining claim? The grant of a mining claim, this court has held in a number of cases, operates as a grant of right of exclusive possession. It is an invitation to the miner to develop the country, to expend his money, with the right to rely upon the good faith of the Government, and the Government is bound by the same rule in the disposition of its public lands, I take it, as ordinary men are bound in their business transactions upon the moral side of life.

Counsel lays some stress upon the fact that the Land De-

partment had this supervisory power which has been referred to. I would like to refer to the case of Cornelius *v.* Kissel once more, wherein we find a quotation with reference to this supervisory power of the Land Department, the right to recall a certificate of purchase and nullify it. This court says, in substance, that after the man has secured his certificate of purchase by entry and payment he cannot be deprived of it; that the right to a patent therefor can no more be taken away from him by order of the Commissioner than can any lawfully acquired property, and that any attempt at deprivation in that way may be corrected by the judiciary.

In the case of Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589), cited by my distinguished adversaries, they stopped their quotation a little too soon, because this court says, following the quotation in my adversaries' brief:

"But this right can only be exercised upon notice to the entryman."

The act of 1872 made no provision for notice.

Will your honors grant me a moment to distinguish the case of Lakin *v.* Dolly from this case? That was a case where 257 acres were granted, and which brought about the dialogue here with reference to the operative effect of the denial of petition for a writ of certiorari. That case has since been explained and differentiated by the circuit court of appeals, and by the same judge who wrote the original opinion. There is a diagram of the situation at page 54 of my brief. I think the opinion in the circuit court of appeals was written by Mr. Justice McKenna. The Lakin-Dolly case was explained in this way: Here was a piece of ground containing

257 acres, with a lode in one end which covered the town of Johnsville—a settlement of people, stores, houses, and warehouses—and they had taken in a large area of land there, and had a patent for it. The title originated under the act of 1866. It appeared in that case, according to the circuit court of appeals in the Peabody case, recently decided and reported in 111 Federal Reporter (cited in our main brief), that ordinarily the presumption would follow, from the possession of a patent, that it was regularly issued, and that the quantity of land was authorized by the local rules; but, said the court of appeals—

"The admitted facts effectually rebutted the presumption which would otherwise have attended the patent—the presumption that the locator was lawfully entitled to all the premises described in his grant and that all the previous requisites of the law had been complied with."

In that case there was an agreed statement of facts which specifically stated that there was no local rule or custom that allowed to the miner an excess of 100 feet on each side of the center of the vein, and that the Land Department, in charge of determining the extent of the surface, had issued a patent in violation of that agreed fact.

In the North Star case, I have on page 56 of my main brief a diagram which shows how these diverging and converging lines may happen by a change in the course of the vein in different locations. This North Star was one of the early locations in Grass Valley. It was made up of an aggregation of claims—the Helvetia and Lafayette, Independence and White Rock, and a number of claims—which were ultimately united into one ownership. Of course, before

they were consolidated each individual could not have claimed his lode at right angles to the local course within his particular claim without producing inequalities in depth, as the course of the vein was irregular.

The manner in which these things occur under the act of 1866, I think, is clearly pointed out in the North Star case. The end lines were not parallel, but at the extremities each line was at right angles to the strike at that point, and that made perhaps a converging line, whereas it might have been a diverging line. There had been no entry in the North Star case at the time the act of 1872 was passed. They had simply applied for a patent, and it was held up for a long while, so that they did not receive it for a number of years after 1872. This case was decided in the circuit court of appeals and certiorari applied for to this court and denied. I do not understand that the court is responsible for the legal value of the opinion of the circuit court of appeals in that case, but that case has been cited by this court in connection with some of its later decisions. The case stands as a classic in its way.

If your honors please, I am admonished that my time has almost expired, and I do not know that I can add anything more to the literature of this case or enlighten this court upon the subject before us.

I might say that this case has a moral environment. If such be the case, this court recognizes it, and it is not necessary for me to dwell upon that branch of the case. Technically it is not the proper thing to do. I simply submit that these ore bodies are within the rectangular planes which the courts have sanctioned as complying with the act of 1866; that we had the equivalent of a patent under the act of 1866,

and the act of 1872 in three distinct parts, specifically, carefully, cautiously, and repeatedly reserved all rights theretofore granted.

"That sections 1, 2, 3, 4 and 6 of an act granting the right of way to ditch and canal owners over the public lands and for other purposes, approved July 26th, 1866, are hereby repealed, *but such repeal shall not affect existing rights.* Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act"——

Ours is one of those cases.

—"and all patents for mining claims heretofore issued under the act of July 26, 1866, shall convey all the rights and privileges conferred by this act, where no adverse rights exist at the time of the passage of this act" (sec. 2328, R. S.).

"Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July 26th, 1866, *nor shall this act affect any right acquired under said act*" (*ib.*, sec. 12).

And section 16 provides:

"That all acts and parts of acts inconsistent herewith are hereby repealed; provided *that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws.*"

These clauses manifest the unequivocal intention of Congress to preserve all rights previously acquired, and the act

must be so construed, as was said by Judge Field in the Eureka case (4 Sawyer, 323):

"The act of 1872 preserves to the miner the rights acquired under the act of 1866 and confers upon him additional rights."

It may not be out of place for me to say in closing that this case came up before the supreme court of California in banc, which court was graced by such men as Chief Justice Beatty, formerly also chief justice of Nevada and for a long time a *nisi prius* judge; Judge McFarland, who was part and parcel of the early mining history of California, and other distinguished jurists. They concurred in the opinion, which was unanimous, in favor of the extralateral rights within the rectangular planes.

I am grateful to the court for its patience.